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A

PRACTICAL TREATISE

ON THE LAW OF

MARINE INSURANCE.

A

PRACTICAL TREATISE

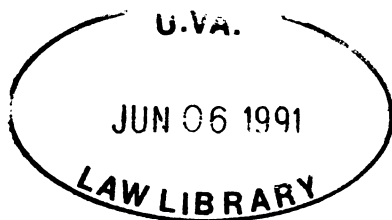
ON THE LAW OF

MARINE INSURANCE.

BY

RICHARD LOWNDES,

AUTHOR OF "THE LAW OF GENERAL AVERAGE," ETC.



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PREFACE.

SOME knowledge of the law of Marine Insurance is almost indispensable to a shipowner or merchant, and it is important that that knowledge should be correct so far as it goes. It is true that most shipowners and many merchants sooner or later acquire some such knowledge without the trouble of reading books, from their own experience; but this method of acquiring it is apt to be costly, as the most valuable part of the experience is derived from the consequences of their own mistakes. Hence there has always been a demand for little books like the present, and there has generally been a supply. Stevens on Average, Bailly on General Average and the Perils of the Seas, and Hopkins's Handbook of Average and Manual of Marine Insurance, are examples of the kind. All these, like the present volume, were written by average-adjusters,—a class of persons whose peculiar experience gives them great opportunities of at least knowing what is wanted.

All these books, however, like law-books on a larger scale, must either be constantly kept up to the level of the latest decisions, or they run the risk of ceasing to be safe guides to the mercantile reader, on account of the rapid growth of law and consequent change of practice (*a*). The time seems to have come for something new.

(*a*) For example, between the printing and the publishing of this volume, there are two fresh decisions. One I have noticed in Appendix E. The other (*Rivaz v. Gerussi*) in the Court of Appeal, Nov. 19, 1880, establishes that to make

untrue declarations of value on a "ship or ships" policy, representing risks which have run off as of less value than they actually were, vitiates a policy on the ground of concealment, or rather of misrepresentation.

In these pages I have endeavoured to put in few words, and in as plain language as I could use, such matters relating to the law of Marine Insurance as I thought a merchant or shipowner ought either to know or have within easy reach. I have taken the opportunity of discussing here and there some questions of principle as to which the law does not seem perfectly clear, but my main object has always been, to write something which might be serviceable to a mercantile reader,—to those who have not leisure to study the great work of Arnould.

I must be allowed here to express my sense of the great obligation I am under to Mr. Arthur Cohen, Q.C., M.P., who in the midst of his laborious occupations has found time to read through my proof sheets, and to give me many valuable suggestions and criticisms. I hope this service, on the part of so well-known a master of this branch of law, may be taken as a guarantee that there will be found in these pages no serious misstatement as to what the law is; though, if there should be, the fault and the responsibility must lie with me.

I have also to acknowledge obligations to several friends who have in one way or another aided me in this book; and in a high degree to my relation, Mr. William S. Byrth, of the Middle Temple.

LIVERPOOL AND LONDON CHAMBERS,
LIVERPOOL, *December*, 1880.

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INTRODUCTION.

MARINE INSURANCE may be called a contrivance for ^{Purpose of} division of labour. Whereas a merchant or shipowner has ^{marine} to study the markets all over the world to find profitable employment for his ship or sale for his merchandize, and is ^{insurance.} liable withal to have his calculations baffled at any moment by the uncertain accidents of the seas, insurance relieves him of this latter disturbing element in return for a fixed payment, which may be computed beforehand. Thus the risks of the sea and the risks of the market are made two distinct objects of study. The insurer (or underwriter), concentrating his attention on the statistics of shipwreck and disaster, and the accurate appraisement of the several risks, according to the voyage, season, character of the ship, or kind of cargo, learns to minimize and apportion the premiums he asks, so as to hold his own against competition, yet make a fair profit, and by a judicious spreading of his ventures make it with tolerable certainty. The merchant, on his part, relieved from all care as to the perils of the seas, and needing no reserve fund on that account, can trade on a smaller capital, work out his calculations of required gains with greater nicety, and so be content with a smaller but more certain profit on each transaction. The door of competition is thus opened to persons of slenderer means, who might otherwise be beaten out by great capitalists or companies; and hereby there is a third that gains, and that largely, and all over the world, namely, the consumer; since insurance in several ways tends to lower market prices, and keep them steady.

Tests of
any system
of insur-
ance law.

Insurance, then, being a contrivance for a specific purpose, a law or body of rules concerning it must, one would think, approximate to its perfection in proportion as it carries out this purpose more completely. For this, the first condition is that these two functions, the study of sea-risks and the study of markets, shall be kept distinct from one another, so that each may be in the hands best fitted for it; in other words, that the fluctuations of the market shall be as nearly as possible immaterial to the insurer, and the accidents of the sea as nearly as possible immaterial to the assured. Next in importance is the condition that this shall be done economically; which implies, that the law shall secure for the underwriter, at the time of insuring, such knowledge of the real nature of the risk, and, when his turn comes to pay, a liability so graduated to the amount on which he has received his premium, and to the conditions of his contract, that he can afford to ask no more than a fair price for his risk, needing no surcharge to indemnify him against possible deception or uncertainty. The touchstone of a good system of insurance law is its fulfilling these two conditions.

Usage.

But to determine the best way of combining these two conditions, so as to produce a really good system, is a problem not altogether of pure reasoning, but one that requires for its solution the aid of experience. The results of experience come before Courts of law under the form of mercantile usages. The manner in which reasoning and usage have been and are to be brought into combination for the purpose, may, perhaps, be made somewhat clearer by a slight sketch of the history of marine insurance.

Origin of
insurance.

Marine insurance, invented probably by Jews, but first brought into general use by Italian merchants, has now existed from six to seven hundred years (a). Of the

(a) In what is here set down concerning the antiquities of the law of insurance, I have chiefly followed

M. Pardessus, whose unrivalled collection of maritime laws, with the Dissertations which introduce and

first three or four hundred of these we know, beyond the fact of its existence and gradual extension, absolutely nothing; the manner of its growth is not recorded. At the end of that time its usages, such as they had then come to be, began to be written down. A century later, the force of law began to be given to these usages, by means of codes. This process was carried on in Europe for about a century before it reached England, when Lord Mansfield virtually laid the foundations of our own law of insurance. From Lord Mansfield's time to the present day is again only about a century,—so that the English case-law forms, in point of duration, a small fraction only in the growth of this branch of the law merchant. But it is by far the most valuable portion. "If a perfect system of the law of insurance," says a distinguished American jurist, "in all its extent and in all its branches, shall ever be constructed, the judicial decisions" [of England and the United States] "will be found to supply its most extensive and choicest materials, and it is principally from the English Reports that these materials must be drawn" (b).

Those first unrecorded 350 years (or thereabouts), however, were perhaps in reality the most important of all, since in these the contract of insurance, we know not after how many internal conflicts, took a shape essentially the same, at least in outline, as that it still retains. The first period.

We cannot place the origin of this invention much later than the first half of the 13th century, and there are good reasons for carrying it half a century further back. Villani, the Florentine historian, who died in 1348, informs us that it was devised by the Jews, upon occasion of their expulsion from France about A.D. 1182, to facilitate the removal of

connect them, have as yet hardly been studied, at least by English writers on the law of insurance, so much as they deserve. It is not too much to say that the historical

Introductions of Park, Marshall, and even Duer and Phillips, are completely antiquated by this great work.

(b) 1 Duer, *Ins.* 52.

their property from that kingdom; a story which, as Duer justly points out, even if not true, proves at least that when Villani wrote, the origin of insurance was old enough to have been forgotten (c). The oldest mention of insurance in any public ordinance is in that of Pisa, dated 1318 (d). Insurance is alluded to by two Florentine writers early in the 14th century (e), and there is mention of it in Venetian public documents of A.D. 1411 (f) and 1468 (g). These are the earliest traces; and from this point to the publication of the *Guidon de la Mer*, between A.D. 1556 and 1584, it may be stated generally that, while we find ample proof of the existence and extension of marine insurance, there is little or nothing to show by what laws or rules it was governed.

The maritime commerce of Europe during this period, though of course not to be measured by a modern standard, was in extent by no means despicable. It includes that important trade between East and West—a trade carried on by means of caravans across the desert and ships through the Mediterranean, connecting Egypt, Persia, India, and even China, with Italy, Spain, France, England, Flanders, and as far as the Baltic—which sprung up after the Crusades, and which, by the taste for luxuries and refinements it introduced, changed the face of Western

(c) 1 Duer, 28, 31. M. Pardessus substantially agrees with Judge Duer as to the probable antiquity of this invention. (4 Pard. 567.)

(d) 4 Pard. 566. M. Pardessus, who, in one of his earlier volumes, had thrown doubt on a statement in a work called the "Chronicle of Flanders," that insurance was known at Bruges in 1310, afterwards retracts this doubt. Considering, he says, that, as it is impossible to question, a document of 1318 proves that insurance was known at Pisa; that it is named in the work of Pegoletti relative to

the commerce of Pisa composed in the first half of the 14th century; and that Uzzano, in his Treatise on Commerce, composed in 1400, speaks expressly of insurances made in Florence for London and "for Bruges;" it is likely that the "Chronicle of Flanders" may in this matter be founded on trustworthy tradition, and be worthy of credit. (4 Pard. 567.)

(e) 4 Pard. 567.

(f) Hopkins, Manual of Insurance, 19—22.

(g) 5 Pard. 65.

Europe. It includes the great age of the Italian republics, when Florence was the seat of important manufactures, and, with Venice and Genoa, became the carriers of Europe. And lastly, it includes at least the beginnings of the ocean traffic which followed the doubling of the Cape of Good Hope and the discovery of America. During this period ships began to be made larger; from the little barks of Columbus we come to the galleons of Philip II. During this period occurred likewise a change in the mode of conducting sea-traffic, which may be termed the beginning of the modern commercial system; namely, that merchants gradually left off sailing, as the primitive practice had been, from port to port with their wares. Italian merchants, becoming magnates and sometimes princes in their little states, naturally began to live more at home, and sent clerks and agents, and at last often a single supercargo, in charge of their goods on shipboard. This necessitated the establishment of factories or branch houses in the several foreign ports they traded with; and hence we find, during this period, Lombard merchants permanently settled in London, Rouen, Bruges, and other principal seaports throughout Europe. Each of these changes must have led to modifications, more or less considerable, in the system of insuring.

The second period, that in which these traditional rules and methods of insurance began to be reduced to writing, dates from the latter half of the 16th century. Spain introduced it; rules for the mercantile tribunals which regulated disputes with underwriters having been drawn up—first by orders of the corporation of the city of Burgos, A.D. 1538, then by that of Bilbao in 1560. These regulations, however, prolix, obscure, incomplete, perhaps kept purposely in few hands, seem never to have obtained a wide circulation (*h*).

(*h*) There is likewise an Ordinance of Florence, A. D., 1523, which seems to come under the same category, since it, unlike the earlier Ordinances which dealt only with matters of procedure, lays down

In France, however, about the same time, there appeared a remarkable document of a very different character. This was the "*Guidon de la Mer*."

The
Guidon.

Between the years 1556 and 1584 was printed, in the "noble city of Rouen," a small volume of about a hundred pages, by an unknown hand, with a preface which to a good many readers must have been attractive. It invites "all who put forth and traffic by sea, particularly the masters of ships, mates and pilots, and likewise those who do not themselves go to sea, but may be glad to invest their moneys in that way," to read here the "style and usance" to govern themselves by, without the need of seeking counsel elsewhere. They were to know that this volume had been drawn up by two able wealthy merchants of Rouen, for their own use and that of their friends, but not for publication: but that having been borrowed from them, and privately copied, it was now given to the public, on account of its rare value. If there were faults, it was added, these must not be set down to the printer, but to the transcriber (*i*).

This volume has been called "the oldest treatise on insurance." But there are reasons for believing it to be not so properly a treatise as a body of rules intended for the governance of the Consular Court at Rouen. Such a Court, called that of "the Prior and Consuls," was introduced into that city, after a pattern then very common throughout Europe, in the year 1556, and continued to exist there until 1584, when its place was taken by a

some few principles; as, that policies must be in one specific form, that premiums must be paid in advance, that if the loss were privately known to the assured before insuring he could make no claim on his insurer, that perishable articles must be specially named in the policy, that goods on deck were not to be considered insured, and that underwriters must pay first and plead

afterwards. (4 Pard. 598, *et seq.*) This, however, covers only a small part of the subject.

(*i*) 2 Pard. 373. These faults, in a later edition of 1603, the oldest M. Pardessus was able to find, were in fact so numerous that he thought it better, in his own work, to follow the modernized version of Cleirac; so that we have not the book in its original garb.

Court of Admiralty; and the references to the "Prior and Consuls" in the *Guidon* prove that the book belongs to this period. This Court of the Prior and Consuls superseded an official called the Greffier, one of whose duties had heretofore been to adjudicate on claims concerning policies of insurance, reducing him to a position somewhat analogous to that of our clerk to the magistrates; and it appears a not unlikely conjecture that the *Guidon* was a body of rules and instructions, drawn up by an able and experienced Greffier for the guidance of his new chiefs. Some such theory would account for the curious mixture of enunciation of customs and customary rules, reasoning, and positive regulations concerning matters confessedly new, which make up the *Guidon* (k).

Be this as it may, we have in this book, arranged under heads with some pretence of method, if not all, at least by far the largest portion, of that which remains to us of the insurance practices of these first 350 years. Here is exhibited the condensed result of so many years of experiment, internal ferment, and growth towards maturity. We are not to think of it as the French system, or something different from the Italian, or the Spanish, or the English. Insurance, in those days, was independent of nationality. The merchant, a migratory being, was, like the Jew, a citizen of the world: his dealings were with men of every country, and he no more thought of a municipal law of insurance, one thing in Venice and

(k) For example, in chap. 8, art. 1, whereas the rule had formerly been that the master's statement on oath was to be accepted as proof, the *Guidon*, reciting the abuses this was liable to, says "*parquoy a l'avenir lesdits maitres ne seront croyable, ni leur equipage, au simple rapport,*" and proceeds to set forth some very sensible rules for cross-questioning them in the presence of the merchants; thus at a stroke

changing the system of procedure from one of affidavits to *vivâ voce* evidence. Other similar instances may be traced. That the Consuls of the various seaports of Europe had written books or codes for their official guidance, which books were jealously kept private, may be learnt from a curious account which M. Pardessus gives of such a document used by the Consuls of Pisa in the 13th century. (4 Pard. 558—560.)

another in Rouen, than of a municipal law of bottomry or general average, or municipal rules for avoiding collisions at sea.

This *Guidon*, which to us now appears an invaluable relic, preserving a whole history that would otherwise have perished unrecorded, was probably not much thought of in its own day. It was, after all, merely a record of practices which the few who at once cared to know them, and were readers of books, were already familiar with by talk with men of their own calling on exchanges or market-places. The only extant edition was full of printer's errors, and as the French language gradually changed, became more and more hard to understand. But in 1656, Cleirac, writing his treatise on the "*Us et coutumes de la mer*," republished the *Guidon* in a more modern dress. Twenty-five years later, the celebrated *Ordonnance* of Louis XIV. gave the force of law to provisions, the greater part of which were drawn from this treatise.

Third
period.
Positive
legislation.
The Or-
donnance.

Colbert, the enlightened minister of Louis XIV., had conceived the design of constructing a Code of maritime law for the kingdom of France, which should take the place of the various and often conflicting customary laws of the several provinces; and this design, though perhaps as difficult as one which we in England content ourselves with wishing for, the French statesman accomplished. How this was done, may be gathered from the pages of Valin (*l*). The existing written materials, in the shape of old laws and ordinances, not of France only, but of other countries, appear to have been collected, their subjects arranged under heads, and a comparative criticism made. A commission of inquiry, with ample powers, went round the several seaports, for the purpose of ascertaining what customary laws or rules were observed in each, their origin, and practical working. The materials thus ob-

(*l*) Valin, Comm. sur L'Ordonnance, pref. viii.—x., edit. 1829.

tained were then placed in the hands of one man, a lawyer, to work into shape (*m*); after which the Code was settled, article by article, in the King's Council (*n*). Amongst the written works thus used as materials for the first stage in this process was the "*Guidon de la Mer*;" a comparison of which with those articles of the Ordonnance which treat of insurance, shows that the Ordonnance is little more than an authoritative and condensed reproduction of the *Guidon*.

The influence of the Ordonnance was felt throughout Europe. It took the best part of a century, however, before that influence reached England, or at any rate the English courts of law.

In England, according to Malyne, who wrote in 1622, Lombard merchants had at an early period established their trading companies or agencies, and with these their practice of marine insurance; and this latter, according to the same author, we in our turn had the honour of introducing into Antwerp and the Low Countries, in proof of which he alleges that to that day it was the practice to insert in the policies drawn up at Antwerp a clause to the effect that the contract should be as valid and binding as if it had been subscribed in Lombard Street, in the city of London (*o*).

England came late into the field of commercial enterprise. "Some attempts were made by Parliament," says Marshall, "in the reigns of Edward III. and Richard II., to encourage English shipping, but without effect; for we find that in the eighteenth year of Henry VI. the Commons petitioned that no Italian or other merchants of the countries beyond the streights of Gibraltar should sell here any other merchandize than that of the countries beyond those streights. And the reason assigned for

(*m*) This lawyer, says Valin, was rewarded for his trouble with the post of Master of Requests, from which, however, he had presently

to be removed, his abilities proving unequal to it!

(*n*) 4 Pard. 239—246.

(*o*) 1 Marsh. Ins. 11.

Early history of insurance in England.

the regulation thus prayed was, that the Italians had become the carriers, not only of the commodities brought from the countries within the streights, but also of the countries without the streights, which were not brought in such abundance, nor sold so cheap, as when they were brought by the merchants of the countries which produced them. The petitioners prayed, therefore, that this might pass into a law for ten years; but the King did not consent to it. At length, however, by stat. 1 Rich. 3, c. 9, great restraints were laid, both upon these Italian merchants and their commerce" (*p*).

In the reign of Queen Elizabeth, a statute was passed in which, after a recital of the great usefulness of marine insurance, and that insurances had been practised time out of mind within our realm, and that controversies concerning them had heretofore been settled by certain grave and discreet merchants, appointed thereto by the Lord Mayor of London,—a vestige probably of the mercantile tribunals of the "Prior and Consuls" common at that time throughout Europe,—proceeded to constitute a more formal Court for the purpose, having power to enforce its decrees by imprisonment, but to act in a more speedy and simple method than that of the ordinary courts of law (*q*). This new court, however, never attracted much business. Merchants and underwriters appear to have gone on the old way, preferring arbitrators of their own selection, presumably as being more knowing in the ancient usages of insurance. The result was that, during the long period between the statute of Elizabeth and the time when Lord Mansfield took his seat as Chief Justice of the King's Bench, in 1756, there were surprisingly few judgments concerning insurance in the Courts, and these very unimportant. Up to the time of Lord Mansfield, we have it on the authority of Mr. Justice Park that what few insurance cases were reported in the books were

(*p*) 1 Marsh. Ins. 12.

(*q*) 1 Marsh. 27.

"such loose notes, mostly of trials at Nisi Prius, containing a short opinion of a single judge, and very often no opinion at all, but merely a general verdict, that little information can be collected upon the subject" (r).

We are not, however, without the materials for a tolerably accurate knowledge of the state of our ^{Early English} practice, at the period which immediately preceded that which may be called the starting-point of the English case-law of insurance. These are to be found in the writings of Beawes, whose "*Lex Mercatoria Rediviva*" appeared in 1754, and of Magens, whose "Essay on Insurance and Collection of Sea-Codes" was published in the following year. These volumes show that, in the absence of native judicial authority, the practices of merchants and insurers were largely influenced, if not governed altogether, by the Codes, Ordinances, and commentators of the Continent. Amongst these, the "*Guidon de la Mer*" is usually cited as chief, and next to it the Ordonnance of Louis XIV. ; though the Ordinances of Antwerp, Amsterdam and Rotterdam, Bilbao, Middleburg, and others, are likewise constantly referred to. Oral practices were becoming absorbed in, or confused by, the written rules of foreigners, while there was as yet nothing of home growth to take their place.

The great intellect and lucid eloquence of Lord Mansfield here came in to supply a real want. During the thirty-two years (1756 to 1788) that this great judge sat on the bench, he did more towards constructing a law of insurance than has, or indeed could by possibility have, been done during any equally long period since. His long supremacy gave a sort of unity to the system which it has retained ever since ; and thus his work may almost be compared to that of legislation. We have in his judgments the foundations of perhaps every department in our system.

(r) Park, Ins. Intr. xlviii.

Mode of
growth of
the English
case-law.

Such, then, was the aspect in which marine insurance presented itself to the English Courts of law, at the time when they began seriously to direct their attention to it. It came before them as a very ancient and matured system, resting partly on the basis of foreign codes and ordinances and partly on the practice of mercantile men. The ordinances differed from one another more or less in details, but were all cast in one mould, indicating a common origin. The practice, so far as it went beyond these ordinances, was not always intelligible, as to its grounds, even to the professors of it; but was not the less on that account the object of an almost superstitious veneration, being supposed, from its long acceptance, to be peculiarly adapted to the requirements of seafaring men, merchants, and underwriters.

First stage:
submission
to practice.

What the Courts had to do was, first to ascertain what this system was, and then to assimilate it to the general principles of English law; and this last was to be done in such a manner as not to deprive it of those special qualities which had rendered it thus acceptable to mercantile men. This has been done very gradually, and the earlier steps in the process were naturally unlike those taken later. For the first of these purposes,—the ascertaining and defining with precision what that system was,—there was requisite an almost absolute deference to foreign laws and to mercantile practices. Hence, the principles of insurance were at first gathered almost exclusively in the way of induction, from noting the treatment of particular cases which was adopted in the practice of merchants. During this period, these practices were regarded as things sacred; special juries of merchants, supposed to be cognizant of them, were appealed to by the judges for their guidance on what would now be regarded as matters of pure law (*t*); the Courts refused even to listen to merely theoretical arguments, when the

(*t*) *Lewis v. Rucker*, 2 Burr. 1167.

point at issue could be determined by custom (*u*); and it seemed as if the function of the judges was reduced to the humble one of registering the customs of merchants, and the rules which had been laid down in foreign codes or by foreign commentators, like Valin and Emerigon.

By degrees, however, as more and more of this system of ancient customary or foreign law was brought before the Courts, till the outline of it was disclosed and it began to be understood as a whole, a change of treatment on their part insensibly set in. Custom now had little fresh important matter to reveal. One point of practice was naturally compared with another: where several of such corresponded, the principle of the correspondence was sought out; where they contradicted one another, it began to be questioned which of them was in the right: in either case, the transition was made from a search after practices to an inquiry into principles. The steps in this transition took the form of rules successively laid down by the Courts for limiting the domain of custom or usage. The first of these rules was, that usage must in no case be permitted to override the language of the policy, even in its printed part,—a matter as to which there had previously been some laxity (*x*). At a later period it was laid down that a usage, to be binding, must be reasonable (*y*). This naturally led to the distinguishing of usages under two heads: those which admitted, and those which from their nature did not admit, of being

Second
stage:
criticism
of practice.

(*u*) *Palmer v. Blackburn*, 1 Bing. 61; *Winter v. Haldimand*, 2 B. & Ad. 649; and see 1 Duer, 283.

(*x*) *Blackett v. Royal Exch. Ass. Co.*, 2 C. & J. 244.

(*y*) See 1 Duer, Ins. 268. It is not here intended that this doctrine was at that time in itself a novelty: probably it was from the oldest

times, implicitly at least, a principle of the English common law: the novelty lay in the application. Until the system of insurance as practised had come to be somewhat understood by the Courts as a whole, they were not in a position to criticize the reasonableness of its usages.

determined by some general principle. To the latter head belong such matters as the rule that the deduction to be made for the improvement of a ship by putting in new work in place of old shall be assessed at one-third of the cost; there being in this no other principle than the convenience of having some one uniform scale for the deduction. How much that deduction should be, is a matter of almost arbitrary detail; and as to this the ancient and general practice of merchants was adopted by the Courts without questioning (z). But where there is a practice which pretends to legislate on matters which admit of deduction from principles, it is now clear that the Courts will attach no weight to it. They will be judges of its reasonableness, and this they will judge upon principles; and since they would have judged the question upon the same principles had there been no practice at all, the result is, that the practice is almost entirely disregarded (a). There has been insensibly, on the part of our Courts, a complete change of attitude towards mercantile usages.

Thus has grown up by degrees an English law of marine insurance, not based on *a priori* principles, but gradually transforming or enlarging the matter given to it in the form of usage or rules imported from abroad, under the influence of principles belonging to the general mercantile law of England. This growth is still going on; for, although so much has been settled that the main outline of the system is now unalterably determined, and perhaps some of its branches may be said to be complete and final, many points still remain *sub judice*. We may not only hope, but expect with some confidence, that these undetermined questions will be dealt with, by the wisdom of our judges, on principles not less broad and

(z) *Lohre v. Aitchison*, 2 Q. B. D. 501, at 508. *Co.*, 42 L. J. (Q. B.), 84; *Atwood v. Sellar*, 4 Q. B. D. 342; 5 Q. B. D. 286.

(a) *Stewart v. West India S. S.*

enlightened than are to be found in the later, as distinguished from some of the older, judgments; so that, when this branch of law comes to be codified, as sooner or later it is sure to be, the result may stand as superior to the great Ordonnance of Louis XIV. as the age of Victoria is better than the age of the *Grand Monarque*.

MARINE INSURANCE.

CHAPTER I.

INSURABLE INTEREST.

§ 1.—MARINE insurance is a contract whereby one who has an expectation of pecuniary gain—or risk of loss, which is the same thing in another form—depending on the safety of property exposed to hazard at sea, may secure himself by paying beforehand a fixed sum as the price of the risk.

§ 2.—We are to guard ourselves throughout the study of this subject from two possible misconceptions. Insurance is not and must not be made a mere means of wagering. On the side of the underwriter, indeed, it really is a wager; he, for a fixed price, taking the chance of safety or loss. But on the side of the assured it is a contract of indemnity; wagering in the form of insurance being, in this and most other countries, prohibited as against public policy.

§ 3.—The other misconception, which runs deeper, consists in the notion that what is insured is not an expectation of gain by safe arrival or risk of loss in case of shipwreck, but a mere right to the replacement of what the property has cost. This is the oldest idea of insurance, and we are growing out of it by degrees; for it is, as will be seen in the sequel, totally erroneous and misleading. In some countries, as in France, where this old

B

notion has been acted on consistently, the insuring of freight and expected profit is still prohibited. In England, the true idea of insurance is better, though as yet not perfectly, carried out.

§ 4.—The expectation which is insured must of course be the expectation such as it exists at the time of insuring: a subsequent change of circumstances, as for instance a rise in the market for the goods, may introduce an uninsured element, or otherwise lead to complications. Some of these complications are got rid of by permitting the assured to value his interest on the face of the policy at an amount not open to dispute afterwards.

§ 5.—Expectation of pecuniary gain, or risk of pecuniary loss, furnishes the touchstone of what is called insurable interest, or the right to insure. A person who stands in such a relation to property that he will sustain a pecuniary loss by damage done to or loss of the property occasioned by the perils insured against, has an insurable interest.

This subject of insurable interest, with which we begin, includes the questions, who may insure, what may be insured and for what term, and, how much may be insured. Of these, all except the last are so closely connected together that I propose to group them in one, dealing afterwards with the question of amount. A few words as to wager-policies must be set down by way of introduction.

WAGER-POLICIES.

§ 6.—At common law, originally, every insurance, unless the contrary were expressed, was required to be based on an actual interest; but the parties were allowed to insert clauses in the policy dispensing with interest or with the proof of it (a).

In the reign of George II., shortly after the South Sea Bubble, suspicions arose that a system of gambling under

(a) *Cousins v. Nantes*, 3 Taunt. 513.

the guise of insurance, permitted by these clauses, had led to various mischiefs, such as the fraudulent wrecking of ships and contraband or illegal traffic; and an Act of Parliament (b) was passed, to put a stop to it. By this Act, every insurance made with any of the clauses specified, viz., "interest or no interest," or "without further proof of interest than the policy," or "without benefit of salvage," or made by way of gaming or wagering, was declared wholly void. Some exceptions were allowed, but these have by a subsequent statute (c) been swept away: and now, as the result of several decisions in our courts, it may be broadly stated that every insurance which either in the letter or the spirit contravenes these Acts,—that is, which either contains any one of these clauses, though there be a real interest at bottom, or which, though without these clauses, is not based on a real interest, is wholly void (d).

INSURABLE INTEREST IN CARGO.

§ 7.—Insurable interest in merchandize may conveniently be classed under the heads of ownership, the legal title of a trustee, a right of lien, an equitable lien or assignment, or the being answerable for its safety as a bailee. These are the principal, though perhaps not the only, relations to property which give a right to insure as principal (e).

§ 8.—In the case of ownership, the right to insure, or Ownership. to recover as a principal in the event of loss, begins when ownership begins, and ends when it ends. He who buys a cargo "free on board" does not become owner of it till it has come on board; therefore, as he loses nothing if

(b) 19 Geo. II. c. 37.

(c) 8 & 9 Vict. c. 109, § 18, enacting that all contracts or agreements by way of gaming or wagering shall be null and void.

(d) *Smith v. Reynolds*, 1 H. & N 221; *De Mattos v. North*, L. R. 3

Exch. 185; *Mortimer v. Broadwood*, 20 L. T. 398; *Allkins v. Jupe*, L. R. 2 C. P. D. 375.

(e) See *per* Willes, J., in *Seagrave v. Union Mar. Ins. Co.*, L. R. 1 C. P. 305, at 319.

part be lost in a lighter coming off to the ship, he cannot use his policy, though it be one that includes the risk of lighterage in loading, for the protection of the vendor. Or if by the terms of his purchase he is not liable for the purchase-money until an entire cargo has been shipped, he cannot use his policy to recover, either for himself or the vendor, a loss of cargo that takes place during the loading (*f*). If he claims for himself, the answer is that he has lost nothing; if for the vendor, he has no right to oblige the vendor at the expense of his underwriters. So if he sells the cargo afloat, and does not at the same time agree to transfer the policy to the purchaser, he cannot use it to recover a subsequent loss, either for his own benefit or that of the purchaser (*g*).

§ 9.—If indeed a sale is made in such a manner as to reserve the vendor's right of stoppage *in transitu*, the policy continues in force so as to protect that right; such a vendor having what is analogous to a lien on the cargo (*h*).

Lien.

§ 10.—One who has a right of lien on merchandize, or a power to take possession of it on arrival and retain it, or the proceeds of it, as security for a debt, has likewise the right to protect that lien by insuring the goods. The most frequent case of this kind is that of a consignee who has made advances on the security of the bill of lading.

(*f*) *Anderson v. Morice*, L. R. 10 C. P. 609; 1 Ap. Ca. 713.

(*g*) *Powles v. Innes*, 11 M. & W. 10; *North of England Oilcake Co. v. Archangel Ins. Co.*, L. R. 19 Q. B. 249. It is usual, in selling afloat, to include the policy; the terms being "cost and insurance," or, sometimes, "cost, freight, and insurance." Under such a contract, any policy actually effected by the vendor must be handed over to the purchaser, and the latter is entitled to require a policy sufficient to cover

the original cost of the goods, *i.e.*, their cost at the port of loading, including the premium, but not necessarily an amount equal to the sale afloat. (*Ralli v. Universal Mar. Ins. Co.*, 31 L. J. (Ch.) 207, 313; *Tamvaco v. Lucas*, 1 B. & S. 185; 3 B. & S. 89.)

(*h*) *Comp. Broune v. Hare*, 3 H. & N. 484; 4 H. & N. 822; and *Wait v. Baker*, 2 Exch. 1; and see *Seagrave v. Union Mar. Ins. Co.*, L. R. 1 C. P. 305; at 317—319.

There is no doubt that such a consignee can insure the goods in his own name, and for his own benefit, to the extent of the advances. If he goes beyond this and insures to the full value, he recovers the surplus, in the event of loss, as trustee for the owner of the goods (*i*).

§ 11.—A consignee to whom the owner of the goods owes money, though not in respect of advances on the security of the goods themselves, and to whom the goods are consigned for the purpose of discharging or reducing the debt, may apparently be considered as having a sort of equitable lien on the goods, sufficient to entitle him to insure them (*j*). Assign-
ment.

§ 12.—Lastly, one who is answerable for the safety of the goods, as a common carrier or wharfinger, may protect himself against this liability by insuring the goods (*k*). Bailee.

§ 13.—In all these cases, where the right to insure the same goods subsists in more than one person, *e.g.*, in the owner and in one who has a lien, it is not to be supposed that under the two policies together more than a single indemnity can be recovered, since the losses in the aggregate cannot exceed the entire value of the commodity (*l*).

(*i*) *Ebsworth v. Alliance Mar. Ins. Co.*, L. R. 8 C. P. 596. The Court in this case were equally divided on the question whether in such a case the surplus could be recovered by the assured in an action brought in his own name.

(*j*) *Hill v. Secretan*, 1 B. & P. 315; and see *Seagrave v. Union Mar. Ins. Co.*, L. R. 1 C. P., at 319. The rule is given by Willes, J., as follows: "The general rule

is clear, that, to constitute interest insurable against a peril, it must be an interest such that the peril would by its proximate effect cause damage to the assured." (*Seagrave v. Union Mar. Ins. Co.*, L. R. 1 C. P. 305, at 320.) See Appendix A.

(*k*) *Crowley v. Cohen*, 3 B. & Ad. 478; *Waters v. Monarch Life Ass. Co.*, 5 E. & B. 870.

(*l*) See *Arn. Ins.* 117-119.

INSURABLE INTEREST IN SHIP.

§ 14.—Each partowner of the ship has the right to insure his share as principal: if the managing owner insures the whole, he insures the shares of his co-owners merely as agent (*m*).

Sale at sea. § 15.—If a ship is sold at sea, the policy of the vendor ceases to cover it, unless it be transferred to the purchaser for a price or as part of the transaction of sale (*n*). If however the sale is on such conditions as to leave the risk of the voyage, or any part of it, with the vendor, the policy continues to protect him to that extent (*o*).

Mortgagee. § 16.—If a ship is mortgaged, the mortgagee is entitled to insure it as principal to the extent of the mortgage debt. If he claims more than that, he must prove that the policy as to the surplus was originally effected for the benefit of the mortgagor. In such cases, therefore, it is better for both parties to come to a clear understanding as to insurance beforehand (*p*).

Charterer. § 17.—If a ship is chartered, with the condition that she is to be at the charterer's risk, or that the charterer shall be answerable if she is lost, the charterer has a right to protect himself by an insurance of the ship; and he may insure in his own name, and recover as principal. This does not do away with the right of the shipowner to insure her likewise (*q*).

§ 18.—As with cargo, if two persons have insured the ship, and each to the full value, the total recovery in case of loss can only be for one value of the ship, since no more is really lost on the whole.

Outfit. § 19.—Sometimes the outfit is insured separately from

(*m*) *French v. Backhouse*, 5 Burr. 2727; *Robinson v. Gleadow*, 2 Scott, 250.

(*n*) *Powles v. Innes*, 11 M. & W. 10.

(*o*) *Reed v. Cole*, 3 Burr. 1512.

(*p*) *Irving v. Richardson*, 2 B. & Ad. 193.

(*q*) *Hobbs v. Hannam*, 3 Camp. 93.

the ship. This is not to be recommended. The outfit is that portion of the ship's furniture or apparel which ordinarily perishes or is consumed in the course of the voyage. It is laid in to earn the freight, and is compensated for when the freight is received. To insure both outfit and freight is thus to insure the same thing twice over. When no freight can be insured, a shipowner naturally desires to insure his outfit. But in fact, as will be explained when we discuss the subject of insurable amount, an ordinary policy on the ship is understood to include the outfit, not merely of spare rope and the like, but of provisions for the crew (*r*), and even, it is said, advance wages paid to them (*s*). This being so, a separate insurance on outfit can only be in fact a sort of double insurance on the ship. The purpose of such an insurance may be more simply and safely attained, by an additional insurance of the ship itself, at an enhanced valuation.

§ 20.—With regard to passenger ships, the policy on the ship is understood to cover all such passenger-fittings as are permanent, or go on voyage after voyage; but not the passenger provisions or stores laid in for the particular voyage only. There is however no great use in insuring these, since it is all one to the owner whether they are sunk or eaten (*t*). Passenger outfit.

§ 21.—In whaling voyages, an insurance on the ship does not cover the harpoons, lines, and other tackle for the fishery (*u*). Whalers' tackle.

INSURABLE INTEREST IN FREIGHT.

§ 22.—Is it right to permit the insuring both of a ship and her freight?

(*r*) *Brough v. Whitmore*, 4 T. R. 206.

(*s*) *Shawe v. Felton*, 2 East, 109.

(*t*) The insuring of passenger-liabilities is another matter: see

§ 43. Surplus passenger stores, were it worth while, might be insured.

(*u*) *Hoskins v. Pickersgill*, 1 Park Ins. 126.

In the oldest sea laws known to us and dealing with insurance, the insuring of freight was prohibited: in France it is so still. But the reason assigned for this prohibition is not the same reason as that to which the reader's attention is now to be invited.

A great part of the confusion which runs through some branches of the English law of insurance is occasioned by the want of a clear apprehension of the true relation between the ship, considered as a subject of insurance or a commodity of value, and her freight. This can only be removed, I think, by rightly understanding what it is that constitutes the value of a ship.

A ship is a mere machine for earning freights, and her value is represented by the present or capitalized value of her future earnings, added to what she may eventually fetch for breaking up. This is obvious at a glance in the case of a ship so nearly worn out as to be only fit for one voyage more; such a ship being evidently worth to her owner, what she will earn on that voyage and what he can then break her up for. The principle is of course the same in cases where the calculation may be more difficult. The ship's value in the market is no more than a rough approximation to this result, made by a number of persons: for, the price a man will offer for a ship in the market must at last be regulated by, or find its maximum in, the amount he expects to earn by employing her.

This being so, it is evident that the freight which at any given moment a ship is engaged in earning is a constituent part of that ship's value at that moment, just as much as any of her future freights. It makes no difference whether a freight is contracted for or not. Suppose a ship to be placed on the market for sale, and competed for by two bidders, of whom one is ready with a charter arranged for a six months' voyage, which will bring him in a profit of 1500%. ; the other has no contract ready, but knows that he can earn a clear 1500% by the employment of the ship for six months. Further, let us suppose both to be con-

vinced that at the end of this six months the ship will be worth 8500*l*. On these facts, each should be ready to bid against the other for the ship up to 10,000*l*.

This might lead us to the conclusion that it is not right to insure both ship and freight, for if the freight is only a part of the ship's value, to insure both would be to insure the whole and a part too.

There are however great practical conveniences in insuring freight by itself; particularly because the earning or losing of a freight once contracted for may depend on contingencies separate from the safety of the ship: for instance, the ship may be lost and yet the freight earned by transshipment, or the ship may be saved and the freight lost because the cargo is lost.

But then, if the freight is insured by itself, the fact ought to be recognized that what remains of the ship's value, after excluding this freight, is a portion only of its entire value. We shall see as we go on what confusion, it might even be said what injustice amounting to absurdity, has resulted from not recognizing this somewhat obvious truth.

§ 23.—The rule of English law, as to the right to insure freight, is, that a freight actually contracted for under a bargain that can be enforced at law may be insured; but a future freight which is as yet a bare expectation, not thus secured, cannot be (*v*). If a ship has been chartered,

(*v*) The case commonly known as "the orchella-weed case" well illustrates the strictness with which this distinction is enforced. A ship was at anchor off one of the Cape de Verde islands, loading orchella-weed: some had been put on board, and men were at work on the island, picking and preparing enough weed to fill the ship, the Governor of the island having promised her a full cargo, when a storm came on, and the ship was wrecked. Here the underwriters

on freight were held liable to pay the loss of freight on that portion only which had been actually laden. "For aught that appears," said Lord Ellenborough, "the Governor might have refused to send on board another bag, without subjecting himself to an action, and although the storm had never arisen, the ship might have been obliged to return to Liverpool nearly empty." (*Patrick v. Eames*, 3 Camp. 441.)

the charterer must supply a cargo or be liable to an action; one way or the other, the earning of freight, if not prevented by the perils insured against, is a certainty (*w*). But a ship that sails in ballast seeking a cargo to carry, however confidently or reasonably a freight may be expected, may fail to find employment; so that to insure the expected freight at that stage would be little better than a wager. If a ship not chartered is loading on the berth, the requisite legal certainty is acquired as each parcel of goods is put on board, or is contracted for.

PROFIT AND SIMILAR INTERESTS.

Profit
generally.

§ 24.—The insuring of profit in any form was of old strictly forbidden, sometimes under heavy penalties (*x*); and the reason why the insuring of freight was prohibited was, that it was a kind of profit. This arose from the mistaken idea of the purpose of insurance already pointed out (§ 3). It was argued that no one ought to make a gain from another man's loss, and that a merchant must therefore be content with an indemnity for actual loss suffered, that is, the replacing of what the thing insured has cost him (*y*).

The law of England long ago discarded this narrow

(*w*) It must now apparently be taken that this certainty arises, not merely when the ship has actually entered into the service of the charterer, but so soon as the charter has been executed: see *Barber v. Fleming*, L. R. 5 Q. B. 59; *Foley v. United Fire and Mar. Ins. Co.*, L. R. 5 C. P. 155; and *Potter v. Rankin*, L. R. 3 C. P. 562; 5 C. P. 341.

(*x*) By the Ordonnance of Louis XIV., the penalty for valuing goods beyond their cost or value in the loading port was, that the policy became wholly void, and the goods themselves were forfeited. (Ord.

Tit. 26, Art. 22; 4 Pard. 373.)

(*y*) By the same Ordonnance, the shipowner is forbidden to insure his freight, the merchant his profit, or the master his wages. Emerigon, commenting on this, says, that in buying and selling it no doubt is lawful to make by fair means a profit at the expense of another, but not so in insurance, this being a contract only to prevent loss, and as to which the maxim of the Roman law, *nemo debet locupletari aliend jactura*, is applicable. (Emerigon, *Traité d'Assurance*, ch. 9, § 1.)

conception of insurance. It recognizes the fallacy in it; that it is not true that the merchant makes a gain by the insurer's loss, if he is merely placed thereby in the same position as if the loss had not occurred, which he can only be, by receiving the same profit on the sale of his merchandize as he would have received had it arrived safe (z).

§ 25.—Profit, then, may be insured; and this either separately as an interest by itself, or with the goods as a part of their value (a). The latter is the better course, when goods and profit belong to the same person; only, as will be seen, it is then necessary to make a valuation, or to state on the policy that such or such a rate of profit is included. If the profit is on a purchase to arrive, so that the expected profit and the ownership of the goods are in different hands, a separate insurance on profit must be made.

§ 26.—When profit is insured by itself, it is necessary, before recovery in case of shipwreck, to prove that at the time of wreck the interest in profit still continued; or in other words that, as things stood then, had there been no wreck, there would have been some profit (b). This seems to be requisite, even in the case of a valued policy, if on profit alone. This rule makes the right to insure profit separately one of little use, except in cases where either the market is steady or the profit has been secured by a re-sale or otherwise.

§ 27.—If the owner of a ship lades her with goods of his Profit or

(z) *Barclay v. Cousins*, 2 East, 544.

(a) In a recent case it came out in evidence that underwriters at Lloyd's treat it as a matter of course, not necessary to be communicated to them, if a profit not exceeding 25 or in some cases even 30 per cent., is added to the cost of goods in making a valuation. (*Ionides v. Pender*, L. R. 9 Q. B.

531, at 535.

(b) *Hodgson v. Glover*, 6 East, 316. In the United States, the rule is that when an interest in the goods themselves has been proved, interest in a fair mercantile profit on them follows as a matter of course. (*Patapsco Ins. Co. v. Coulter*, 3 Pet. 222, *Phillips Ins.*, § 318.)

freight on
ship-
owner's
goods.

own, the gain he expects from carrying them to a market is really composed of two elements, his freight as shipowner and his profit or loss as merchant, and these elements it is sometimes hardly possible to separate from one another. This expectation, then, may be insured either under the name of freight or as an increased value of the goods.

§ 28.—This last interest is constituted, or begins to exist, so soon as a cargo has been purchased or set apart for the specific purpose of being carried in the ship, and the ship is likewise ready to load or fetch the cargo; from which point of time the earning of this freight or profit is,—subject only to a change of intention on the part of the shipowner, which presumably he would not make but in prospect of a more profitable freight,—a matter of legal certainty (c).

Prepaid
freight.

§ 29.—Secondly, one who by prepayment of the freight, or a part of it, has secured for himself the right to have his goods carried in a ship free of further charge, or free of it to the extent of the prepayment, is to that extent in a position precisely analogous to that of a shipowner who has goods of his own to carry (d). He has therefore an

(c) *Flint v. Fleming*, 1 B. & Ad. 45. See cases cited Arn. Ins. 66, n. 1. *Devaux v. Janson*, 5 Bing. N. C. 519.

(d) The law concerning the prepayment of freight belongs more properly to the law of affreightment than to that of insurance. It may be very briefly summed up as follows:—Since, in general, freight is not due till the cargo is delivered, a prepayment or advance of money from the shipper or charterer to the master at any earlier period must be regarded as a mere loan,—to be repaid if by any accident the freight is not earned,—unless an intention to the contrary be in some way

expressed or indicated on the charter or bill of lading. But as shipowners find the receiving of such advances very convenient, but the refunding after a loss less so, it is usual, in the great majority of cases, to have such intention not to refund indicated in the contract of affreightment. Any words to the effect that the advance is “in part-payment of freight,” or that it is insurable by the charterer—which implies a risk of the voyage on his part—will suffice for this purpose.

To constitute an absolute prepayment, it is not always necessary that the charter should contain an authority to the captain to draw

insurable interest, which he may describe either as "advance-freight," or as an additional value of the goods to be thus carried.

§ 30.—The point at which this insurable interest begins to exist has not as yet been defined by any legal decision. Some think it begins as a matter of course so soon as the prepayment has been made. On principle, however, a further condition seems to be requisite, viz., a legal certainty of deriving benefit from the prepayment. A charterer who prepays freight, intending to occupy the space in the ship thus purchased with goods of his own, which he has in readiness for shipment, has undoubtedly an insurable interest from the time of prepayment or even of contracting to prepay; and it would seem to be immaterial whether the ship is already at the place where the goods are lying, or is to go in ballast to fetch them. It ought, on principle, to be otherwise in the case of a mere speculative charter; as, when a man charters a ship, prepaying the charter-money or a part of it, and then places the ship on the berth, expecting to find shippers. Such a charterer is in precisely the same position as a shipowner who in like manner places his ship on the berth on his own account. In the case supposed, the charterer, instead of buying a ship, has bought the use of one for the voyage; but the probability of his obtaining a freight for her is, until contracts with shippers are actually made, no more a legal certainty in the one case than the other. It is hardly necessary to say that the right to insure is given, not by the prepayment, but by the expectation of a commensurate advantage which is based on it.

§ 31.—An interest somewhat analogous to profit is ^{Commissions.} that of commissions. A commission to be derived from the sale of goods consigned to him, may be insured by a

part of his freight in advance. Such an authority may be implied from the custom of trade, or the mere exigencies of the master's

position in a foreign port. (*The Karnak*, L. R. 2 P. C. 505, at p. 514.)

consignee : and his title to insure attaches so soon as the consignment to him becomes a legal certainty, as by receipt of a bill of lading, or any such promise or contract with the shipper or owner of the goods as would support an action for damages in case the consignment was withheld (e).

INSURABLE INTEREST IN ADVANCES.

§ 32.—Another possible subject-matter of insurance is an advance or loan ; which may be insured, provided the repayment of it is conditional on the safe arrival of property exposed to sea peril, or provided such property constitutes the security for the loan, so that a loss of it, though it may not extinguish the debt, would deprive the lender of his security. On these conditions, but not otherwise, an advance of money constitutes an insurable interest.

Loans on
bottomry.

§ 33.—The first and most perfect example is a loan on bottomry or respondentia. Of such loans there are two totally distinct kinds, which may be distinguished as voluntary and necessary. Voluntary bottomry is perhaps the more ancient of the two, and is indeed of far greater antiquity than insurance itself, but is now, so far at least as British shipping is concerned, practically obsolete, having been superseded by less onerous methods of raising money. This kind consists in borrowing money for the outfit or equipment of a ship, or sometimes even to assist in building one, on the condition that the money lent, together with a premium or percentage of profit, shall be repaid on the ship's safe arrival at a port named,

(e) Commissions or profits which are merely the "expectation of an expectation,"—*e.g.*, which are expected to be derived from the sale of goods expected to be, but which are not yet, bought or shipped,—do not constitute an insurable interest. (*Knox v. Wood*, 1 Camp. 73.)

Though seamen may not insure their wages, the captain may insure his commissions, as well as his effects, or any goods he may have on board as his private venture. (See cases cited in *Arn. Ins.* p. 45, n. z.)

but be forfeited by the lender in case the ship be lost on the way. The convenience of such a system, in a rude state of commerce, when insurance was unknown, is obvious enough. At the present day, in this country at least, such loans are superseded by mortgages, advances by banks, or other methods; and our law, which discourages the giving of secret or unregistered liens on ships, forbids the owner of a British ship to take money on bottomry in a British port, or elsewhere except under the pressure of unforeseen necessity (*f*). But it must be borne in mind that there are many countries in which this prohibition does not exist: and, as regards the ships of those countries, there is no reason why voluntary bottomry loans should not be insured by English underwriters. Such insurances, however, are rare, in comparison with bottomry loans justified by necessity.

§ 34.—A bottomry loan of this latter kind is ordinarily taken up by the master of the ship, at a port of refuge, when money is wanted to repair the ship or to defray expenses necessary for the completion of the voyage, and when either there is no time, without undue delay, to consult the owners of the ship or cargo, or these, when applied to, refuse to provide the requisite funds. The power of making such a loan, and of pledging the property entrusted to his care as security for its repayment, is conferred upon the master of a ship by the laws of all maritime states in the case of "instant, unprovided necessity," and in that case only. Against the abuse of this power there are various precautions, equally universal amongst all nations; as, that the master can only raise money on bottomry when he finds it impracticable to do so on the personal credit of his owner; that he can only raise it for expenses absolutely necessary for the completion of the voyage, which necessity the lender must himself see to at his peril, otherwise the bottomry bond is

Bottomry
in case of
unforeseen
necessity.

(*f*) *Royal Arch*, 1 Swab. 269.

void; and, lastly, that he must not have recourse to bottomry until application for funds has been made, wherever practicable, not only to the shipowner but also to the owners of the cargo (*g*).

§ 35.—The lender of money on these terms is entitled to protect himself against the risks he runs by insurance. It is an old and now well-established rule of maritime law that such insurances must show on the face of the policy the nature of the risk; that is, the policy must be expressed to be "on bottomry" (*h*).

§ 36.—A respondentia loan differs from bottomry only in being made on the security of merchandize alone,—as in the case where the ship has been condemned and sold, and the cargo is forwarded to its destination in another bottom, subject to a charge for expenses which fall exclusively on the cargo.

Marine
salvage.

§ 37.—A second kind of insurable interest which may be classed under the head of advances, is that of salvage, or disbursements giving a lien on the cargo, whether for general average, or special charges.

A salvor, who has an absolute right to salvage so soon as he has brought the property salvaged into a place of safety, and who has a lien on what he has saved, is entitled, if he permits that property to be removed thence to some other place while he is still unpaid, to protect himself against the risk he runs by an insurance on it.

General
average
expenses.

§ 38.—If the shipowner or his agent has incurred during the voyage any expense which forms the subject of general average, he has a right to insure at all events the cargo's share, for which he has a lien on the merchandize (*i*). It is true that he has, or is generally believed to have, a right in such a case to recover the general average from the owner of the cargo notwithstanding a subsequent loss, but his security based on the lien would

(*g*) *Karnak*, L. R. 2 A. & E. 1394.
289; *Bonaparte*, 8 Moore, 459. (*i*) *Briggs v. Merchant Traders'*
(*h*) *Glover v. Black*, 3 Burr. Association, 13 Q. B. 167.

be gone, and this risk he may guard against by an insurance. And the same rule applies to disbursements at an intermediate port applicable specially to the cargo, such as the cost of reconditioning it when damaged (*j*).

§ 39.—We may go one step further, and say that an advance which is secured on property in such a way as to give an equitable lien on it, or a preferential right which could be enforced, under the old system, through the machinery of a court of Equity, may, in some cases at least, give an insurable interest in the amount so advanced. This doctrine is laid down in the following case. The English owner of a ship gave a written authority to his agent in New Orleans to make advances for port charges and other necessities for the ship at that place, and to draw against the freight for the amount advanced. The agent put the ship on the berth, loaded her with cotton, drew against the freight as directed, and, through a correspondent here, insured the amount drawn for as “advance on account of freight.” The legality of this insurance, a loss having taken place, was questioned; but the Court held that the authority given by the owner operated as an equitable pledging of the freight, and carried with it a right to insure (*k*).

§ 40.—One or other of these two conditions, however, —either that the debt will be extinguished, or that the creditor will be deprived of a valid security for it, by a loss from the perils insured against, is always requisite in order to establish an insurable interest in an advance. It is not enough that the debtor's whole fortune may be embarked in an adventure by sea, so that the loss of it may convert him from a desirable borrower to a condition of insolvency; since his poverty does not extinguish the debt, and when he had property his creditor had no legal hold on it (*l*).

(*j*) *Hingston v. Wendt*, 1 Q. B. 684.
D. 367.

(*l*) *Lowry v. Bourdieu*, 2 Doug.

(*k*) *Wilson v. Martin*, 2 Exch. 468.

INSURABLE INTEREST IN LIABILITIES.

§ 41.—The right of a bailee, *e.g.*, of a common carrier, warehouseman, or wharfinger, to insure the goods in his charge against risks for which he would be liable (§ 12), is an example of a more general rule, viz., that not merely an expectation of gain, but liability to loss, which may come in the form of a payment to a third party, gives a title to insure.

Liability of
shipowner
for fault
of master
or crew.

§ 42.—Thus the liability of a shipowner to be answerable in damages to third parties, whether to the owner of another ship with which his own comes into collision, or the owners or consignees of the cargo in his own ship, for damages incurred through the misconduct or negligence of his own servants, is a risk that may be insured against. This is partially done by means of a clause inserted in policies on ships, called the "Collision Clause;" which, though in form apparently a mere appendage to the policy on the ship, is in reality a totally distinct contract or insurance by itself.

Liabilities
under
Passenger
Acts.

§ 43.—Again, the liabilities of a shipowner under the Passenger Acts may be insured. Passage-money is usually paid in advance, so that a clear total loss of the ship, when the passengers are lost too, causes no loss of passage-money to the owner. But in case of partial disablement, or when the ship is wrecked and the passengers are saved, these Acts impose certain liabilities on the owner of the ship with relation to the passengers, such as the duty of feeding and forwarding them; which liabilities a shipowner has by the Act (*m*), as apparently he would have without it, the right to insure against.

AMOUNT OF INTEREST INSURABLE.

Having considered what things may be insured, and by whom, we are next to inquire, to what amount. And here

(*m*) 18 & 19 Vict. c. 119, § 55.

it may be convenient to consider, first, apart from authority, what are the true principles, and secondly, to what extent those principles have been adopted into the law of England.

§ 44.—Whatever is insurable, we have seen, is, and is ^{The true principles.} only insurable because and so far as it is, an *expectation*,—an expectation of gain depending on the safety, or of loss which would follow the destruction, of some thing exposed to sea-hazard. This is true, not merely if the interest be in its nature an expectation and nothing else, as in the case of freight, profit, or the like, but though it be the ownership of a substantial thing. I have an insurable interest in my ship, or my merchandise, only because and so far as I have an expectation of gain, depending on its safety.

The amount insurable must be then, on true principles, ^{Principle :} the *amount expected*. It must be the amount which is ^{amount expected at time of insuring.} expected at the time of insuring, since it is then that the contract is defined. The assured proposes to himself at that time to make a definite contract, paying a fixed price for an indemnity, the amount of which is to be thereupon determined at once. Even if, as a matter of convenience, the amount of interest being then unknown, the assured should prefer to insure a larger sum, with the condition that the amount of interest should be defined thereafter, and the surplus of premium refunded, still it is necessary that the principle on which the amount is to be eventually determined shall be such as may serve equally for the case of total loss or of safe arrival, since the contract is to serve for either case. In every case, therefore, the true basis of insurable interest ought to be, the amount of the expectation, either at the time of the insuring, or at the commencement of the risk,—two periods which may practically be taken as coinciding.

Now the value, at the outset of a voyage, of an expectation which depends on the safe performance of it, clearly ^{This means, the then estimated value at} is that which, according to the best estimate which can

the end of
the adven-
ture.

then be made, that expectation will be worth at the end of it. This is, theoretically, the right standard of valuation. If I insure my ship, and wish, if she is lost on her voyage, to be placed in the same pecuniary position as if she had not been lost, I must consider how much the ship will probably be worth at the end of her voyage, taking account of the natural wear and tear she will have suffered, that she will be so much older, and that a quantity of her stores will have been consumed. If I, in like manner, insure my goods, I must consider, not what they have cost, but what mercantile profit I ought reasonably to expect, taking account of what I know concerning the state of their intended market, at the time when I resolve on making the shipment, and deducting the duties, freight, and other charges which I must incur. Only in this way can I obtain an exact indemnity. And so of anything else I have to insure. My interest consists in my expectation, so far as I can at this point of time determine it (n).

If, as often happens, there is something uncertain or speculative in my expectation: if, for example, the amount of it may be enhanced or diminished by fluctuations in the market, which I cannot at present reckon on: all this I must leave out of sight. It is necessary to define my contract now; and I must take my chance, whether the market shall rise, so that a safe arrival will be more profitable to me, in spite of insurance, than a total loss, or fall, so that an arrival would be the worse of the two. If I act thus, I shall at least be completely indemnified for my expectation, such as it now is: for I expect a fair profit on my outlay, otherwise I should not ship the goods; and I know that I am liable to the risk of a fall in the market, and that this is a thing I cannot directly insure against (o).

(n) Should there be a rise of market after the shipment, the assured can of course secure this fresh expectation, by an increased insurance on his goods at a higher

valuation. If he does so, it is not necessary to alter the valuation in the original policy, for the reason given in § 50.

(o) No possible marine insurance

In a perfect system of insurance law, then, the amount recoverable in case of loss would in every case, unless it had been agreed by the parties beforehand, be regulated on this principle. It would be ascertained, by the best practicable means, what was the true value of the expectation at the time of insuring; and, in the generality of cases, there would be no great difficulty in doing so (*p*).

§ 45.—But a more practical question is, how far is this true of the law of England.

The English law, so far as it is to be gathered from decisions of the courts, was settled, as regards the basis of amount recoverable on an unvalued policy, by decisions of the period of Lord Mansfield and Lord Ellenborough, and has not been disturbed since; nor yet, it must be added, has been much acted on, at least during the last thirty or forty years, owing to the prevalence of agreed valuations. The law was thus settled at a period when the deference to mercantile custom, in matters of insurance, was at its height. It was avowedly borrowed from the then practices of merchants; which, in their turn, were borrowed, as to this matter, from the *Guidon de la Mer* and the *Ordonnance of Louis XIV.*; and these, as we have seen, were dominated by the maxim *nemo debet locupletari aliend jacturá*, which was construed in such a sense as to limit insurable interest to the prime cost of the thing insured, and hence absolutely to interdict the insuring of freight

will enable the assured to recover from underwriters a loss caused by a fall in the market when the goods arrive; if the goods are lost, and the market falls before they could have arrived, and the insurer pays the value of the time of shipment, it may be said that he indirectly pays to the merchant his loss by the fall of market. To this extent insurance falls short of one ideal perfection, viz., the making it immaterial to the assured whether his goods arrive or are lost; but this

perfection could only be attained by sacrificing the other requisite, viz., that the rise or fall of the market should be immaterial to the insurer (see *Intr.*).

(*p*) Now that there are telegraphs almost everywhere, there can seldom be a difficulty in determining the net market value at the port of destination, as known at the time of shipment; and this is really the basis of expectation which induced the adventure.

or profit. These old decisions of our Courts thus regulate the amount of insurable interest on principles wholly incompatible with the more modern English doctrine concerning the kinds of things which may be insured.

Present
rules of
English
law on the
subject.

According to these decisions, the amount recoverable in case of total loss under an open or unvalued policy is, for merchandize, the prime cost, including the expense of shipment, and the premium and charges of insurance (*q*); for the ship, its value at the outset of the voyage, including the outfit, stores, and provisions for the crew, their advance wages, and the premium and charges of insurance (*r*); and, for freight, the gross amount of freight expected, together with the premium and charges of insurance (*s*).

Defective-
ness of
these rules.

§ 46.—The defectiveness of these rules is obvious. A merchant is not really compensated by a refund to him, after an interval of time perhaps considerable, of the bare amount he has expended in the purchase of his goods: at least some allowance should be added for loss of interest. Again, regard should be had, not merely to the cost, but to the state of the market for such goods at the place of

(*q*) *Lewis v. Rucker*, 2 Burr. 1167; *Usher v. Noble*, 12 East, 647. The adding of the premium presented a little arithmetical difficulty at first, in the continual addition of premium on premium. It is lawful, says the Guidon, to insure the premium upon the premium: "as, if to insure 1,000 livres at 15 per cent. requires 150 livres, it is lawful to insure the said 150 livres, and to put into the line of account 22 livres 6 sols for the cost of insurance, and so downwards from the larger to the smallest sum." (Chap. 2, Art. 9, 2 Pard. 381.) In process of time it was discovered by some ingenious arithmetician that the sum total of this series was equal to the capital sum or invoice multiplied by one hun-

dred and divided by one hundred minus the percentage of premium. This process is called *covering*.

(*r*) *Shawe v. Felton*, 2 East, 109. See *Forbes v. Aspinall*, 13 East, 323, at pp. 329, 330. Stevens on Average, p. 190; Benecke, 45.

(*s*) *Palmer v. Blackburn*, 1 Bing. 61; *Forbes v. Aspinall*, 13 East, 323. It is to be observed that with regard to adding the premium to the *freight*, the sole reason given for doing so is a dictum by Lord Ellenborough that an owner "has increased the original amount and value of his risk by the very act of insuring!" (*Usher v. Noble*, 12 East, 647.) As if insurance were anything more than the transference of the risk from one person to another!

shipment: since it may happen, if the goods have been purchased some time previously to the inception of the risk, that at the time when the contract of insurance is entered into they are worth to the assured considerably more than their cost (*t*). With regard to the ship, the rule of taking her value at the time of sailing, with all her stores intact, and adding the cost of insurance, was no doubt quite right in times when the insurance of freight was not permitted: because the stores are to be expended, the advance of wages to the crew incurred, the wear and tear undergone, and the premium of insurance paid, in the expectation of replacing those outlays by the ship's earnings; but to permit these outlays and likewise the earnings to be insured, is virtually to insure the same thing twice over. Lastly, as to the freight, leaving aside the question whether the gross or the net freight should be taken account of (*u*), to add the premium of insurance to the gross freight is to make the assured to that extent better off in the event of loss than in that of safe arrival. For merchandize, it is true, it is right to add the premium

(*t*) If the cost be the true standard of value, we might have this absurdity, that a merchant buying two parcels of the same commodity, one before and the other after a rise of market, and sending both in the same ship to the same place, would, though these parcels were, at the time of insuring, and at every point of time subsequently, bale for bale of equal value to him, be paid, in case of loss, as though they were unequal. This difficulty is noticed by Emerigon (ch. 9, § 4, p. 275).

(*u*) As a rule, the best course for a shipowner is, to insure the gross freight, and to value the ship at her worth at the end of the voyage. One reason is, that if the ship is lost near the end of the voyage, after all the expenses of earning it

have been incurred, the gross amount of freight may be lost; so that an insurance on the net freight, or clear profit of the voyage, would not be sufficient. If the owner recovers his gross freight, and the ship's value at the end of the voyage, after her stores have been expended, he recovers all that he has lost. If there is no freight to insure, as in the case of a ship going out in ballast to seek a cargo, it may be judicious to value the ship at what she was worth at the outset of the voyage, or perhaps even higher; for the owner, in sending the ship on such a voyage, must suppose that she will, in one way or other, be somewhat more valuable to him at the port of intended loading than she was at home.

to the prime cost, because the premium is a part of the absolute outlay, and will or ought to be restored in the market price at the place of destination; but to add it to the gross freight is a mere blunder, founded on a mistaken analogy.

EFFECT OF VALUATIONS.

Valuations
in policies.

§ 47.—But if these rules for unvalued policies are defective, no great harm is done, since unvalued policies have practically ceased to exist. It is allowable to insert in the policy, at the time of insuring, a valuation which shall thenceforward not be open to question. The liberty to do this, though it may to a certain extent trench on the prohibition of wagering in insurances, has long been recognised by our Courts in the most unqualified manner. And the convenience and usefulness of it are so great that valuations may now be said to be universal.

Valuations
only to be
questioned
in case of
fraud or
mistake.

§ 48.—The only grounds on which a valuation inserted in the policy can be disturbed, are those of fraud and mistake. If the valuation is so excessive as, when taken in conjunction with other circumstances, to satisfy a jury that it was made with intent to defraud the underwriters, —*e.g.*, as part of a scheme for the wilful wrecking of a ship,—not only will the valuation not stand, but the insurance itself will be wholly void (*v*). And in case of clearly proved mistake, as where there is a valued policy on freight, and it can be proved that the valuation was intended to represent the entire freight, whereas a portion of the freight had been prepaid and therefore was not insurable, such mistake must be rectified (*w*).

Not, on
account
of mere
excess.

But, excluding fraud and mistake, a valuation may be greatly in excess of the real worth of the thing insured, and yet hold good. In a case not reported, where an African merchant, expecting that his ship would be loaded on the coast with palm oil and ivory, insured the cargo,

(*v*) *Haigh v. Delacour*, 3 Camp. 319.

(*w*) *Williams v. North China Ins. Co.*, 1 C. P. D. 757.

valuing it at 11,000*l.*, and by chance she was loaded with palm-kernels, worth only some 3,000*l.*, which were totally lost on the way home, he was allowed to recover the whole 11,000*l.* (x). In another case, where a ship valued at 20,000*l.* was burnt in a graving dock, and had suffered extensive damage on a previous voyage not covered by the policy, which had not been repaired at the time of the fire, so that her actual value at that time was considerably less than the owner must have supposed it to be when he insured her, he was nevertheless held entitled to recover the whole 20,000*l.* (y). But a still more striking case is that of the ship *Sir William Eyre*, which was in like manner totally destroyed in a dry dock before the repairs were commenced, but after an estimate had been made of the cost of them, which showed that the damage suffered under a previous policy was so extensive that the ship, at the time when the new policy attached, was not worth repairing; notwithstanding which the underwriters on this new policy were held liable to pay the full amount of the valuation (z).

The result is that a policy value is, as it has been described by Willes, J., "a conventional sum not representing the real value of the vessel" [or thing insured], "but the sum to be paid by the underwriters in the event of a loss" (a). If the whole thing insured is lost, the amount it is valued at is to be paid without further question. Herein marine fundamentally differs from fire insurance, and may give far more than an indemnity for the real loss.

The expediency of this rule has been sometimes questioned, and attempts have even been made, in very recent times, to set limits to it by legislation. It has been regarded as a temptation to carelessness, if not fraud. Those

(x) *Company of African Merchants v. Liverpool Marine Ins. Co.* The case is to be found in Mitchell's Maritime Register, vol. 15, p. 914, and vol. 16, p. 145.

(y) *Lidgett v. Secretan*, L. R. 6

C. P. 616.

(z) *Barker v. Janson*, L. R. 3 C. P. 303.

(a) In *Lidgett v. Secretan*, L. R. 6 C. P. at p. 628.

who are most familiar with the practical working of the rule will be the least apt to join in agitation for a change. Fraud and gross carelessness in the conduct of maritime commerce are certainly the exception and not the rule; while anything that should hinder the prompt and secure settlement of losses, substituting litigation or compromise, would be a great and everyday mischief. "This point," says Mr. Justice Willes, "has been the subject of much discussion and criticism both by lawyers and legislators; and yet nobody has been able to improve upon the practice as to valued policies which has been recognised and adopted by shipowners and underwriters. . . . It saves them both the necessity of going into an expensive and intricate question as to the value in each particular case; and its abandonment would in the end, as it seems to me, prove highly detrimental to the interests of the underwriters" (b).

§ 49.—It is to be observed, however, that to entitle the assured to recover the full amount of a valuation, it must be shown that what is lost is the whole of that to which the valuation was intended to apply. Thus if I insure and value my freight, intending the valuation to represent the freight of a full ship, and if my ship is lost while only partially laden, and before the remainder of the cargo has been contracted for, I can only recover such a proportion of my valuation as the freight on board bears to the freight of an entire cargo (c).

§ 50.—Further, a valuation is only conclusive as between the assured and underwriters on the particular policy. Hence, if I have a policy for 1,500*l.* on a ship valued at 9,000*l.*, and another for 8,000*l.* on the same ship

(b) *Lidgett v. Secretan*, L. R. 6 C. P. at p. 627.

(c) *Forbes v. Aspinall*, 13 East, 327. If the materials for making a rule of proportion in such a case do not exist,—as for instance when there is a valued policy on a cargo

of African produce, to be obtained by barter, and the ship is lost while partially laden, and while it is uncertain whether she would have been filled up with ivory and palm-oil or with produce of much less value, the policy-valuation must be

valued at 8,000*l.*, and the ship is totally lost, the underwriter on the former policy cannot refuse payment on the ground that I have already received from the latter set of underwriters the full value of my ship, because the valuation in the other policy is nothing to him; though he may refuse to pay more than 1,000*l.*, because I have already received 8,000*l.*, and the ship, as between him and me, must be taken to be only worth 9,000*l.* (*d*).

APPLICATION OF INTEREST TO THE POLICIES.

§ 51.—It may be well, before going further, to complete the subject of insurable interest, by setting forth the rules which determine the manner in which insurable interest must be applied, in cases where the total amount insured, whether in one or several policies, exceeds the amount of interest.

When a claim is made under a policy of insurance, whether for total or partial loss, the first step to be taken is to ascertain the amount of insurable interest. If there is only one policy, and if the amount insured is less or not more than the amount of interest, then in case of total loss the underwriters are to pay the sum insured, and in case of partial loss they are to pay such a proportion of the sum insured as the amount of loss bears to the amount of interest. If the amount insured exceeds the amount

disregarded, and the underwriters simply pay the actual value of the produce lost with the ship. (*Tobin v. Harford*, 32 L. J. (C. P.) 134; 34 L. J. (C. P.) 37.) But when the materials for the calculation are there, the valuation should be the basis: thus, if one-half of the cargo is on board, one half of the policy-value should be paid.

So, if it is clear that the valuation was intended to apply to the entire freight, whereas a portion only of the freight was at risk, the

sum payable must be reduced in proportion; and in doing so the principle of the valuation must be respected. If the freight actually is £5,000 and is valued in the policy at £6,000, and one half has been prepaid and so is not insurable by the shipowner, the claim under the policy is £3,000. (*Williams v. North China Ins. Co.*, 1 C. P. D. 757.)

(*d*) *Bruce v. Jones*, 1 H. & C. 769.

of interest, the insurance as to the surplus is null, and the insurer must return the premium on it.

§ 52.—If there are more policies than one, the rule in general is that the several policies are to be amalgamated, and treated for all purposes of settlement as though they constituted one entire insurance. And this, according to the practice in this country, is done, generally speaking, irrespectively of dates, the later policies sharing the interest rateably with those effected before it (*e*).

§ 53.—Another rule, which at first sight appears inconsistent with the foregoing, is that, when there are several policies, the aggregate amount of which exceeds the interest, the assured may elect to claim in the first instance from whichever of them he pleases, until the amount of his interest is exhausted, and then he can claim no more. But the inequality is then to be redressed, by a contribution of the underwriters amongst themselves, which is to be so regulated that the several underwriters shall eventually pay the same proportion of the entire claim.

Suppose, for example, that a merchant expecting a consignment of cotton from New Orleans, insures 5,000*l*. on cotton valued at 10*l*. per bale. If 600 bales are shipped, and all are lost at sea, the assured, though they are worth 6,000*l*., can only recover 5,000*l*., because he has insured no more. If only 400 bales are shipped, and are all lost, he can only recover 4,000*l*., because his interest is no more. Thus far, the case is precisely the same whether the merchant has taken out one policy for 5,000*l*., or one for 3,000*l*., and another for 2,000*l*. But in the latter case, supposing his interest is only 4,000*l*., he may at his pleasure demand 3,000*l*. from the larger policy and 1,000*l*.

(*e*) In America, and indeed in most other countries, a different rule prevails: the older policy takes interest in priority to that of later date; the "short interest," and consequent return of premium,

falling exclusively on the latter. This difference between the foreign and English rules sometimes leads to confusion, when part of an insurance is effected here and part abroad.

from the smaller, or 2,000*l.* from each. Having done so, the underwriters on the policy which has paid the smaller share are bound to contribute to those on the other policy, so that at last all shall pay four-fifths of the sum insured (*f*). Besides which, the assured is entitled to a refund of the premium on the 1,000*l.* as to which there is no interest, and on which the underwriter has run no risk; and this refund likewise is eventually to be divided rateably between the two sets of underwriters.

§ 54.—Supposing the thing insured is valued at a higher rate in one policy than the other, the assured may, as has been pointed out (§ 50), recover altogether, provided the amount insured be sufficient, to the extent of the higher valuation, at least if he takes the precaution of claiming first on the lower valued policies, reserving the higher to the last. The return of premium for short interest, therefore, in such a case, must be based on the excess of the sum insured over the highest of the valuations.

§ 55.—Concerning the return of premium for short interest or double insurance, one caution must be added. If any one insurance has at one time stood alone upon the risk, so that it might have happened that those underwriters would be called on to pay a total loss, their entire premium is earned once for all, and it is impossible that the effecting of a later insurance, under different circumstances, shall have the effect of depriving those first underwriters of any part of their premium. Thus, where a cargo of cotton, on board a ship reported missing, had been insured for a part of its value at an unusually high premium; and at a later date, the ship having been spoken off Holyhead, a further insurance was effected at an ordinary rate; and it turned out that, owing to some mistake, the sum insured on the whole was more than the value of the cotton; it was decided that on the policies

(*f*) *Newby v. Reed*, 1 Black. R. 416.

first effected there could be no return of premium. If, instead of news of the ship's safety at Holyhead, news of her loss had been received, no second insurance could have been effected, and the first underwriters must have paid the total sum insured ; they were, therefore, entitled to retain the price of the risk they had run (*g*).

§ 56.—If the underwriters have run a risk to the full amount insured, though only for a portion of the voyage or term intended to be covered, they may retain the whole premium : and it matters not, as to this, whether the interruption which relieves them from further risk be a loss which they have to pay for, or one they are exempt from, or a mere whim or caprice of the assured, leading him to abandon the adventure intended. On the other hand, if the risk has not attached at all, so that the underwriter never could be called on for a loss, the premium must be returned ; and this, whether the non-commencement of the adventure arose from some necessity, or from the mere whim or caprice of the assured (*h*).

§ 57.—In every case, then, the retaining of the premium by the underwriter is conditional on his actually running a risk ; with one exception only, namely, the case of fraud or illegality. If there has been on the part of the assured or his agent anything actually fraudulent, or any intention to break the law, as the basis of the contract of insurance, the courts will not interfere to assist a guilty party to recover back the premium he has paid ; not even though the underwriter has been an accomplice in the intention to break the law. Neither party has hands clean enough for him to set the law in motion against the other (*i*).

(*g*) *Fisk v. Masterman*, 8 M. & W. 165.

(*i*) *Chapman v. Kennet*, Park, Ins. 456.

(*h*) See Park, Ins. 775.

CHAPTER II.

THE EFFECTING OF THE INSURANCE.

PART I.—PRELIMINARIES TO THE POLICY.

§ 58.—*What* to insure has been the subject of the last, *how* to insure must be that of the present chapter. This may be divided under two main heads, the preliminaries to the contract, and the contract, or policy, itself.

The preliminaries consist, first, of the employment of insurance agents, whether mercantile agents or insurance brokers, secondly of the negotiations which precede the drawing up of the policy, and lastly of the *slip*, or unstamped memorandum by which the terms of the bargain are set down in writing provisionally, until the policy itself can be drawn up.

MERCANTILE INSURANCE-AGENTS.

§ 59.—By mercantile insurance-agents, as distinguished from insurance-brokers, are understood persons employed to effect insurance in one country on behalf of the owner in another, or employed as men of business because the owner is out of business, or for some other reason prefers to do his work by deputy. We must consider, first the authority, and secondly the duties, of such agents.

§ 60.—Agents must be duly authorized to insure, not *Authority*. merely to enable them to charge their principal with the premiums they pay, but also because, before any recovery from underwriters can be made in the event of loss,

interest must be proved (*j*), and if the assured is not interested as principal, he must prove his authority to act on behalf of one who is.

§ 61.—It is true that if an insurance has been made, in good faith, by one person on behalf of another, without authority, it is in the power of the principal, even after a loss, to ratify and adopt the insurance, which will then hold good precisely as if it had been originally authorized (*k*). But such intending agent of course runs the risk of losing, in the event of safe arrival, the premium he has paid. It is material, therefore, to consider what is a sufficient authority.

In what cases agent bound to insure.

§ 62.—An agent who is bound, must *à fortiori* be authorized, to insure. There are three cases, it has been laid down, in which a mercantile correspondent of the owner of property is bound to obey an order to insure: 1st. where he has funds in hand belonging to him who gives the order; 2nd. when he has been accustomed, in his ordinary course of dealing with the principal, to receive and execute such orders, and has given no notice to dis-

(*j*) *Cousins v. Nantes*, 3 Taunt. 513; and see Stat. 8 & 9 Vict. c. 109, § 18, with reference to foreign ships.

(*k*) This is in conformity with the old law-maxim, "*omnis rati habitio retrohabetur et mandationi equiparatur*." (See *Routh v. Thompson*, 13 East, 274; *Hagedorn v. Oliverson*, 2 M. & S. 485.) In a recent case, an attempt was made to obtain a reversal of these decisions in the Court of Appeal: but the Court held that, admitting that for general purposes the rule might be good that "there could only be a ratification when the principal could himself make the same contract as that ratified," yet with respect to marine insurance there might be an exception. "When a rule has been accepted as the law with regard to

marine insurance for near a century," said Cockburn, C. J., "I do not think we ought to overrule it lightly, because insurances have probably been effected on the basis of the law that has so become settled, and mischief might arise from the disturbance of it. Moreover, I think that this is a legitimate exception from the general rule, because the case is not within the principle of that rule. Where an agent effects an insurance subject to ratification, the loss insured against is very likely to happen before ratification, and it must be taken that the insurance so effected involves that possibility as the basis of the contract." (*Williams v. North China Ins. Co.*, 1 C. P. D. 757, at p. 764, and see p. 766.) As to what amounts to a ratification, see *Arn. Ins.* 163—165.

continue; 3rd. when bills of lading have been sent to him with orders to accept them and insure the goods, and he does accept the bills of lading (*l*). The reason for the first of these rules is, not that in a general way one who has in his hands money belonging to another is necessarily bound to lay it out in whatever manner the latter may direct, and certainly not that he is bound to do so in such a way as to impose on himself a fresh trust: for example, a lawyer is not bound to apply the moneys of his client to the purchase of goods, nor a merchant those of his correspondent to the purchase of lands: but that it is part of the ordinary business of a commission merchant, when ordered to insure, and supplied with the requisite funds, to execute such orders (*m*). Thus the first and second of these rules may be brought under the more general head: one whose business and habit it is to perform for another a certain function, is bound either to go on doing the same, or give his principal timely warning before discontinuing it. As for the third case, the transaction is entire, and the correspondent, adopting one part, virtually binds himself to the whole.

§ 63.—Whether there is any case in which a mercantile agent, though not expressly ordered, nor yet bound to insure, may yet be authorized to do so by implication, so that he can charge his principal with the premium, appears questionable. Cases in which the agent has himself such an indirect interest as would give him a right to insure as principal, of course do not come in question here. A mere shipper, as such, or a mere consignee, as such, is generally understood to have, in the absence of custom or previous dealing, no implied authority to insure (*n*). It may be doubted whether a custom of any particular trade, for a mere agent to insure, where he has no orders, and no personal interest, could be proved (*o*). Practically, the

Can an agent be authorized by implication, yet not obliged to insure?

(*l*) *Smith v. Lascelles*, 2 T. R. 187.

(*m*) 2 Duer, Ins. 126.

(*n*) See 2 Duer, Ins. 108.

(*o*) See 2 Duer, Ins. 127. "In the United States," says Duer, J.,

only safe way for an agent, where his principal is one with whom he has no established course of dealing, is, to obtain distinct instructions as to effecting the insurance (*p*).

Duties of
insurance
agent.

§ 64.—But, whether bound or not to accept such an order, an agent who does accept it is bound to use reasonable care, pains, and skill in carrying it out; failing which, he himself, whether mercantile agent or broker, stands in the place of the underwriters in this sense, that he must make good to his principal the amount which would have been payable by the underwriters had he done his duty (*q*).

Extent of
skill
required.

§ 65.—The degree of skill and knowledge which is required from a mercantile insurance agent, under this penalty, is so much as may be ordinarily expected in a sensible man of business, conversant with insurance in a general way, but not specially versed in its niceties (*r*). More than this is demanded from the insurance-broker. The broker, who acts as intermediary between assured and underwriter, is or ought to be an *expert* in insurance; and as such it is his duty to secure for his principals every legitimate advantage which can be obtained by technical and special skill and knowledge. Thus, from the mercantile agent are required such things as these: that he execute the order given him with exactness and fidelity, communicating to the broker all important facts concerning the risk precisely as they have reached him; that he

“a consignee who is not the owner never insures, unless by express direction, or when he has accepted bills, or otherwise made advances on account of the consignment; and such, it appears from Benecke and other writers, is the general usage on the continent of Europe.” (2 Duer, 107.)

(*p*) The managing owner of a ship, though but a part-owner, has an implied authority to insure the

whole freight: indeed, he usually has a lien on it for disbursements: but not, as such, to insure the whole ship; a share in a ship being a distinct property, which the proprietor usually insures separately. (*French v. Backhouse*, 5 Burr. 2727.)

(*q*) See Arn. Ins. 182.

(*r*) *Per Tindal, C.J.*, in *Chapman v. Walton*, 10 Bing. 63.

use due diligence to have the order executed, not necessarily confining his efforts to the place where he may reside, but, in case of inability to obtain the insurance there, trying London or other places (s); that he use good judgment in not limiting the broker too strictly as to premium (t), or insisting on unusual and impracticable clauses; and that, in case, after all, his efforts to obtain an insurance prove unavailing, he forthwith report his ill-success to his principal, so as to give him the opportunity of taking the needful measures himself (u). From the broker are required such as these: to communicate to the underwriters, at the time of insuring, every fact material to the risk which has been made known to him (v); to insert in the policy all such special clauses as are customary and needful for the protection of the assured (w); to see that the policy is in right form and duly stamped (x); and generally to obtain for his principal the best terms which are practically within his reach, using for this purpose due diligence to make inquiries, *e.g.*, as to the rates of premium charged for such risks in the several offices, as to the credit of particular underwriters, and the like (y).

(s) See *Smith v. Cologan*, 2 T. R. 188; 2 Duer, 242—244; 2 Phill. § 1890.

(t) *Wallace v. Tellfair*, 2 T. R. 188, n.

(u) If an agent thinks proper to refuse to execute an order to effect insurance, he is bound forthwith to notify such refusal to him who gave the order, that he may arrange as to employing some other agent. (*Smith v. Lascelles*, 2 T. R. 188.)

(v) *Seller v. Work*, 1 Marsh. Ins. 243; 2 Duer, 202; *Maydew v. Forrester*, 5 Taunt. 615; *Wake v. Atty*, 4 Taunt. 493; *Campbell v. Rickards*, 5 B. & Ad. 840.

(w) *Mallough v. Barber*, 4 Camp. 150; *Chapman v. Walton*, 10 Bing. 57. For example, since it is neces-

sary, when goods are insured for a part of the voyage only, *not* beginning the adventure from their loading, to show this on the face of the policy (*post*, § 103), a broker who had omitted to do so was held personally answerable for his neglect (*Park v. Hammond*, 6 Taunt. 495). But a broker is only expected to know such points of law as are clearly settled; he may pardonably be mistaken as to matters wherein lawyers doubt. (2 Duer, 214; Arn. 176).

(x) *Turpin v. Bilton*, 5 Man. & Gr. 455.

(y) *Hurrell v. Bullard*, 3 F. & F. 445: see Duer Ins., vol. 2. pp. 229—232.

Effecting of Insurance : the Slip.

§ 66.—All preliminary negotiations, then, as to the rate of premium and general conditions of the insurance, are usually conducted by the broker ; who likewise has to see to the filling up of the policy and obtaining the signatures.

The Slip.

§ 67.—Since the preparing of a stamped policy may occupy some time, whilst the assured often needs to be protected at once, it is usual for the broker to furnish a *slip* or *covering-note*, not stamped, briefly setting forth the main conditions of the contract, and initialed, at Lloyd's, by the underwriters.

Slip cannot
be sued
upon.

§ 68.—This slip is not itself an instrument of contract which can be sued upon in a court of law ; nor can it, like an agreement for a lease, be made the basis of proceedings either in law or equity to compel the underwriter to furnish a policy. This is precluded by the terms of the Statute 30 Vict. c. 23, §§ 7 & 9, which enact that no contract or agreement for sea insurance shall be valid unless expressed in a policy, and no policy shall be pleaded or given in evidence or admitted to be available in law or in equity, unless duly stamped ; and it was, until recently, necessary that it should be stamped before being signed or underwritten (z).

But is
binding in
honour.

§ 69.—The slip, however, is, in practice, and according to the understanding of those engaged in marine insurance, the complete and final contract between the parties, fixing the terms of the insurance and the premium ; and neither party can, without the assent of the other, deviate from the terms thus agreed on without a breach of faith, for which he would suffer severely in his credit and future business (a).

(z) *Fisher v. Liverpool Marine Ins. Co.*, L. R. 8 Q. B. 469 ; 9 Q. B. 418. See *post*, s. 123, n. (c), as to the possible effect of the Stat. 39 Vict. c. 6, § 2, which permits

the affixing of a penalty-stamp to a policy.

(a) *Per Blackburn, J., in Ionides v. The Pacific Ins. Co.*, L. R. 6 Q. B. 674, at 684. "A contract,"

§ 70.—The slip may be given in evidence in order to prove the intentions of the parties at the time of entering into the engagement, or wherever such evidence may be material for any purpose short of enforcing it as a contract (b). May be given in evidence for some purposes.

§ 71.—Since, as it has been pithily expressed, no one is bound to lead his neighbour into temptation, no assured or agent of an assured who receives intelligence of the ship's loss, or other news that affects the risk, between the initialing of the slip and the issuing of the policy, is bound to communicate it to his underwriter (c). If he were to do so, he could confer no real advantage on the underwriter, for the only effect could be, to give the latter a chance of acting dishonestly. No communication need be given after slip signed.

PART II.—THE POLICY.

§ 72.—The *policy* or *promise* (*pollicitatio*, Ital. *polizza*) of insurance is an undertaking on the part of the insurers, in consideration of a premium received, to bear and take upon themselves certain specified perils. Thus it may be described as a sort of promissory note.

As for the form of it, it has been called "hardly in-

says Cleasby, B., "is constituted by the concurrence in intention of two persons, the one promising something to the other, who on his part accepts the promise; it is binding at the time when the two parties separate with that idea in the mind of each: the idea of the one being, 'I promise,' and of the other, 'I accept' The particular evidence or mode of expression required by the statute to make it enforceable at law is a different matter. But to add that expression is a matter of obligation, a thing required, not by any arbitrary code, as the use of the term honour would seem to signify, but

by conscience and the sense of right prevailing universally, and under the influence of which all the transactions of life take place" (in *Morrison v. Universal Mar. Ins. Co.*, L. R. 8 Exch. at 60).

(b) *Cory v. Paton*, L. R. 7 Q. B. 304, at 310; *Lishman v. Northern Maritime Ins. Co.*, L. R. 8 C. P. 216, at 225.

(c) *Ionides v. Pacific Ins. Co.*, L. R. 6 Q. B. 674; 7 Q. B. 517; *Cory v. Paton*, L. R. 7 Q. B. 304; 9 Q. B. 577; *Lishman v. Northern Maritime Ins. Co.*, L. R. 8 C. P. 216; 10 C. P. 179; and see *Morrison v. Universal Mar. Ins. Co.*, L. R. 8 Ex. 40.

Effecting of Insurance: the Policy.

telligible" (*d*), "absurd and incoherent" (*e*), "a very strange instrument" (*f*), "drawn with much laxity" (*g*), and yet merchants and underwriters cling to it, as Mr. Arnould says, "with persevering tenacity." The ordinary or Lloyd's form is said to be (with the exception of the memorandum at the foot,—a modern addition of the year 1745) the same as that first introduced into this country, along with insurance itself, by the Lombards (*h*); and however this may be (*i*), the existing form has certainly been in use without change for several hundred years, and the attempts occasionally made to introduce variations have so far met with little encouragement. This seems to show that it must be tolerably well adapted to its purpose. At any rate, the old form has the advantage of having been explained by many decisions.

Contains
three dis-
tinct stipu-
lations.

§ 73.—Examined carefully, this instrument is found to consist of three distinct engagements or stipulations. The first and principal is the promise, on the part of the insurers, that they will take upon themselves certain specified "perils" or causes of loss which may come to the hurt or detriment of the thing insured, which is specified, on a voyage or for a term which is likewise specified and its limits defined with some precision. The

(*d*) Arn. 231.

(*e*) *Per Buller, J.*, 4 T. R. 210.

(*f*) *Per Mansfield, C.J.*, in *Le Cheminant v. Pearson*, 4 Taunt. 380.

(*g*) *Per Lawrence, J.*, in *Marsden v. Reed*, 3 East, 579.

(*h*) Arn. 231—232.

(*i*) This is perhaps substantially but not precisely true. The oldest form of policy I have been able to find in M. Pardessus's collections is one set forth in a Florentine ordinance of 1523, which I give in the Appendix. A comparison of this formula with the present Lloyd's policy shows many striking points of resemblance, and perhaps

our form may be an improvement on this model. The adoption of one common printed form, with blank spaces for particulars to be filled in, is itself an improvement on the original method, which seems to have been retained in France after it had been abandoned by the Lombard merchants. This older practice was to employ notaries, *greffiers*, or other skilled persons, to draw out instruments of insurance adapted to each particular case. A specimen may be found at the end of an edition of the *Guidon de la Mer*, dated A.D. 1629. (2 Pardessus, 430.)

second part is what is called the "sue and labour clause," which is an encouragement to the assured to use exertions about the saving of his property when in peril, by a promise to contribute to the expenses he may thereby incur. And the modern addition, the memorandum, sets a limit to these two promises, by exempting the insurer, except in events therein named, from claims below a certain percentage, or from claims for damage to some kinds of goods which are regarded as exceptionally hazardous. If each of these three parts is viewed by itself, the "promise" will be found to be tolerably plain and simple.

§ 74.—Beginning with the first of these promises, it will be convenient to go through its several terms, one by one, in their natural order, dealing completely, and once for all, with those of them which lie in small compass, and reserving for a more detailed inquiry those which are too large to be dealt with thus summarily. In this way every part of our subject will stand in its proper place, and can at last be grasped as together constituting an organized whole.

The promise is given to a person named ; it is given whether the thing insured is at the time lost or not lost ; it has relation to a subject-matter or thing which must be specified ; this thing is at risk in or with a ship, under the command of a master, both named ; it is for a voyage or term to be marked out, together with the precise point at which that voyage or term commences and terminates ; the amount of liability may be fixed by a valuation ; and lastly, it is a guarantee against loss from certain specified perils. These, therefore, are the several points to be attended to ; and they may all be dealt with in the present chapter, with the exception of the perils insured against, a topic which will require a separate examination.

Name of the Assured.

§ 75.—The first clause in the printed policy is as follows :—" *Be it known that* , *as well in*

Effecting of Insurance: the Assured.

his [or their] own name, as for and in the name of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all, doth make assurance, and cause and them and every of them to be insured."

These words imply that some name must be inserted (*j*); that it matters not whether it be the name of the principal or of his agent or broker; that the specific nature of the assured's interest in the thing insured need not be described (*k*); and that the policy may enure to the benefit of a future transferee of the interest. And each of these propositions has been, in one way or another, established by law (*l*).

"Lost or not Lost."

§ 76.—The insertion of these words, which immediately follow, provides for the case of a ship or cargo being lost at sea, unknown to either party, at the time of insuring; preventing the raising of any cavil, such as that at the time there existed nothing to insure, or that the insurance was intended to provide for the future only, and not for unknown losses in the past.

The Voyage or Limit of Time.

§ 77.—Next come the words "at and from," with a blank space intended to be filled up, in the case of a voyage-policy, by the names of the places the ship is to proceed from and to, or, in that of a time-policy, by the days which are to limit the duration of the risk,—*e.g.* either "from London to Calcutta," or, "from the 1st of January to the 31st December, 1879."

(*j*) This is necessary by statute : 31 & 32 Vict. c. 86, § 1, an assignee of a policy may in certain cases sue in his own name on the policy. 28 Geo. 3, c. 56, and 30 Vict. c. 23.

(*k*) *McKenzie v. Whitworth*, L. R. 10 Exch. 142; 1 Ex. D. 36. And see Stat. 36 & 37 Vict. c. 66, § 25 (6).

(*l*) Arn. Ins. 234—235. By Stat.

Voyage-policies.

§ 78.—The voyage must be described in such a manner The voyage. that a mercantile man, conversant with the usages of trade, ought to be able clearly to understand what is intended; and the voyage, thus described, must be rigidly adhered to, except of course in the case of unforeseen necessity. The highly penal consequences of a "deviation," or unnecessary departure from the track laid down in the policy, will be pointed out in the third chapter.

The following rules for describing the voyage will Rules for describing it. probably be found sufficient for practical purposes:—

§ 79.—There are three ways of describing a voyage: Three methods of describing a voyage. either every port which the ship is to visit may be named; or general words may be used which cover a certain range and leave room for variations within it; or, lastly, where there is a clear known custom as to the track, and that custom is intended to be followed, it may suffice to name the *termini* only and rely on the custom. Which of these methods is preferable must depend on circumstances.

§ 80.—When the course of the voyage is definitely The first method. fixed at the outset, the first of the three methods is usually the best. It is then necessary to name every port at which the ship is to call on the voyage (*m*), and to name them in the order in which they are to be visited (*n*). This, whenever practicable, should be done in such a manner as to mark clearly which are to be the ports of loading and which the ports of discharge; *e.g.*, "at and from A. and B. to C., D., and E.," where the ship is to

(*m*) *Fox v. Black*, Park, Ins. 620.

(*n*) *Beatson v. Haworth*, 6 T. R. 531; although, however, the order must not be varied, yet any port may be dropped altogether, as this must always diminish, not increase,

the risk. For example, an insurance from A. to B., C., and D. would cover the risk in case the ship sailed from A., cleared with cargo for C. & D. only. (*Marsden v. Reid*, 3 East, 571.)

load part of her cargo at A. and part at B., while C. and D. are places at which, or at some of which, the cargo is to be discharged. This however cannot be laid down as a rule which it is absolutely necessary to observe (o).

Where
same name
denotes
town and
district.

§ 81.—In naming the *termini* of the voyage, one caution is to be observed, viz., that, where the same name designates a town or place, and likewise a district comprehending several places, the name, when used in the policy, is always to be understood in the former, *i.e.*, the narrower sense. Thus, whereas Lyme is a port-town, and there is likewise a district known by the name of "the port of Lyme," which includes Bridport and other places besides Lyme, a policy "at and from Lyme," does not protect a ship which loads at Bridport (*p*). The policy, to cover it, ought to have been either "at and from Bridport," or, "at and from a place of loading within the port of Lyme."

The
second
method.

§ 82.—The second method of describing the voyage, viz., by general words which cover a certain range admitting of variations, must necessarily be adopted when the precise course the ship is to take is not known at the time of insuring. This may involve various complications. The port or ports of loading may be uncertain, while the port of destination is known; or conversely; or it may not be known at what places the ship is to call on the way; even all these matters may be unknown, except in a general way, or within certain limits. The principle throughout is simple: words are to be used which, understood in a mercantile sense, shall convey to a mercantile man, acquainted with the customs of the particular trade, an accurate knowledge of the full range of intended variations. The application of this principle must be a matter of judgment and experience; and it would be unprofitable to set down here anything beyond a few rules for the simpler cases, drawn from decisions of the Courts.

' (o) See *Metcalf v. Parry*, 4 Camp. 123.

(p) *Constable v. Noble*, 2 Taunt. 403.

§ 83.—First, as to the port of loading. A “port” of loading is understood to be a place frequented by ships for the purpose of loading, and at which ships usually load cargoes. Within such a place the ship may be moved from dock to dock, or quay to quay, and load part of her cargo in one and part in another. A “port” in this sense is not necessarily a place enclosed within quays or dock walls: it may be an open roadstead, if that be a place where ships are accustomed to load cargoes (*q*). But “a port” is not to be understood in the more extensive sense of a custom-house district comprehending several towns or places, any one of which may be considered as a port of loading in the sense above described. For example, the “port of Liverpool,” for custom-house purposes, includes Runcorn: a policy at and from “a port of loading in the United Kingdom,” would cover a ship loaded wholly at Runcorn or wholly at Liverpool, or one loaded partly in the Albert and partly in the Canning Dock at Liverpool, but not one loaded partly at Liverpool and partly at Runcorn (*r*). To cover such a risk, the policy should be, “at and from port or ports,” and the same rules apply to the port of discharge.

§ 84.—If the insurance is from or to a district comprising several ports, those ports must be visited in their natural or geographical order, unless there is an established custom of the trade to vary this order, in which case the customary order must be observed (*s*). If, in a particular case, this natural or customary order is intended to be departed from, such intention should be indicated on the face of the policy, which is usually done by inserting the clause “backwards and forwards, or in any order.” Of course, when the precise order intended to be observed is known, a still better way is to specify it on the policy.

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|---|--|
| (<i>q</i>) <i>Harrower v. Hutchinson</i> , L. R. 4 Q. B. 523; 5 Q. B. 584. | |
| R. 5 Q. B. at p. 589. | (<i>s</i>) <i>Beatson v. Harworth</i> , 6 T. R. 533; <i>Gairdner v. Senhouse</i> , 3 Taunt. 241. |
| (<i>r</i>) <i>Brown v. Tayleur</i> , 4 A. & E. 533; and see <i>Arn. Ins.</i> 461. | |

Order of
taking
ports.

The clause giving liberty to touch and stay.

§ 85.—The printed form of policy contains the clause : “*And it shall be lawful for the said ship, &c., in this voyage to proceed and sail to and touch and stay at any ports or places whatsoever*”—here follows a blank space—“*without prejudice to this insurance.*” It may be convenient here to consider the effect of this clause.

Hastily read, these words appear to give an unlimited licence of deviation ; but their force is restrained by the words “*in this voyage.*” This places a twofold limit—as to track, and as to purpose.

Limitation as to track.

§ 86.—As to track, it was very early laid down in our Courts, on the authority of Lord Mansfield, that the printed clause only covers the calling at places in the usual course of the voyage between the termini named in the policy (t). Thus, when it was customary, on voyages from India, to touch at the Cape of Good Hope or St. Helena ; or now, in the case of steamers, on voyages where it is usual to call at intermediate stations for coals ; such ordinary digressions, and such only, are covered by the printed clause. Even where the force of this clause is increased by additions in writing, as, where a ship was insured “at and from Lisbon to a port in England, with liberty to call at any one port in Portugal for any purpose whatever,” it was held that this liberty only allowed the ship to call at a port *north* of Lisbon, *i.e.*, in the course of a voyage between Lisbon and this country, and that she must not go to Faro, which lies south (u). Of course, if the voyage itself has a wider scope, as, for instance, when there are several ports of loading, a liberty to call will have a correspondingly wider range of area (v).

So, if the terms of the policy clearly show that the voyage is to be pursued in an indirect manner, a liberty to call must not be thus limited. For example, where the

(t) *Lavabre v. Wilson*, 1 Dougl. 284.

(u) *Hogg v. Horner*, Park Ins. 626. See also *Gairdner v. Senhouse*,

3 Taunt. 16.

(v) *Bragg v. Anderson*, 4 Taunt. 229 ; *Lambert v. Liddard*, 5 Taunt. 480 ; *Ashley v. Pratt*, 1 Exch. 257.

voyage was "at and from Antigua to England, with liberty to touch at all or any of the West India Islands, Jamaica included," it was held no deviation to call at St. Kitts; because, though St. Kitts lies far wide of the direct course of a voyage from Antigua to England, it does not lie wider of it than Jamaica does; and by naming Jamaica, the underwriters were warned that the voyage was not intended to be a direct one (*w*).

§ 87.—Next, as to purpose:—The purpose for which the ship calls at a port must be something within the main scope of the voyage insured (*x*). Where a ship was insured from Para to New York and back, with leave to call at any of the Windward or Leeward Islands, and land or load goods there, it was held to be a deviation to call at one of the Leeward Islands, not for any purpose connected with the voyage, but to obtain information as to the markets there, to guide the shipowner as to some future speculations in another ship (*y*). Limitation as to purpose.

So, a liberty to "stay and trade" on the Coast of Africa does not protect a ship during her stay there for the purpose of enabling her crew to earn salvage by saving the cargo of another ship (*z*).

§ 88.—Whether liberty to call at a port gives liberty to land or load cargo there, must depend on whether such an intention may fairly be inferred from the description of the voyage in the policy, taken in conjunction with the customs of the particular trade (*a*). As a rule, where the policy names several loading ports, especially if they are Does leave "to call" allow of trading?

(*w*) *Metcalf v. Parry*, 4 Camp. 123.

(*x*) See *Arn. Ins.* 474, and cases there cited.

(*y*) *Hammond v. Reid*, 4 B. & Ald. 72. See also *Solly v. Whitmore*, 5 B. & Ald. 45; and *Bottomley v. Bovill*, 5 B. & Cr. 210.

(*z*) *Company of African Merchants v. British and Foreign Mar.*

Ins. Co., L. R. 8 Exch. 154. The words "stay and trade" meant, it was held, "stay for trading;" and what "trading" is, must be governed by the customary meaning of the term in the African trade, which certainly does not include earning salvage.

(*a*) *Urquhart v. Bernard*, 1 Taunt. 450.

described in general terms, this is a warning to the underwriters that the ship's port of loading is not yet definitely settled, and hence that a liberty asked for to touch at any particular port is likely to be for the purpose of loading cargo there; and so, *mutatis mutandis*, with respect to ports of discharge (b). In order to avoid dispute, it certainly is better in such cases to add the words "and trade," or the like, to the liberty to "touch and stay;" but it cannot be said that this is always necessary. And wherever a ship has liberty to call at a place, she may always land or load goods there, provided this can be done without additional delay (c).

The third
method.

§ 89.—Lastly, in cases where the voyage is not intended to be direct, but yet is to be conducted in a manner defined by a well-known custom, it may suffice, and may even be more convenient, to name in the policy the port of loading and of destination, and these only, in reliance on the notoriety of the custom. This method is more particularly convenient in insuring goods carried in steamers belonging to well-known companies. Such a company may have a practical monopoly of its particular trade, and therefore can frame its own customs, and these an underwriter must be presumed to know. We must go a step further: there are lines of steamers, *e.g.*, those trading to the West Indies or the Mediterranean, which have customary variations,—so that, for example, a steamer going to Venice will on one voyage call at Naples and on another at Ancona. There can be little doubt that a policy on goods by a line steamer may be safely described as simply from Liverpool to Venice, supposing that the goods insured are to be shipped in Liverpool and landed in Venice. Such digressions are in fact covered by the ordinary printed clause, "and it shall be lawful, &c.," above referred to.

In all cases of real difficulty, care should be taken to

(b) See *Metcalf v. Parry*, 4 Camp. 123. (c) *Raine v. Bell*, 9 East, 195; *Laroche v. Oswin*, 12 East, 131.

insert what is called the "deviation clause," viz : "Held covered in the event of a deviation at a premium to be agreed upon" (d).

The subject Insured.

§ 90.—The subject or thing insured is described in a manner that is peculiar. The printed form of the policy stands thus :—"Upon any kind of goods and merchandizes, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat and other furniture, of and in the good ship or vessel." Then, in writing, is set down the specific thing, whether ship, goods as may be described, freight, profit, or whatever it may be, intended to be insured by this policy.

This seems at first sight, and perhaps is, a strange and clumsy contrivance for doing a very simple thing. It obliges us to apply the somewhat objectionable rule of construction, of allowing the written words to overrule, and in case of need even contradict, the printed form. The policy, in its printed form, first describes every kind of thing that can—or that at the time when such policies were originally framed could (e)—be insured, and then, in writing, limits this general description to something more specific. Why this has been done, can perhaps now only be conjectured. Some have thought that the policy was originally framed to suit that primitive state of things, belonging to the very infancy of navigation, when it was the rule for the same man to own the ship and the whole

(d) The objection to the "deviation clause" is, that an underwriter has no security of obtaining an additional premium, as he ought to do, in the event of a deviation which increases the risk but is not followed by a loss. To guard against this, a form sometimes used is the following :—"In event of de-

viation, held covered at a premium to be hereafter arranged, provided notice of such deviation be given to the insurers on receipt of advices." Even with this, it can only be used where there is a mutual reliance for fair and upright dealing.

(e) Ship and goods being originally the only things insurable.

cargo (f); yet this can hardly be, considering that maritime adventure had passed beyond this stage as far back as the time of the Roman law, if not long before it, while insurance is a far more modern invention. But, be this as it may, this remarkable manner of describing the subject insured is not without its advantages. It points out that although the thing insured may be an expectation, it must always be such an expectation as has in some sense a basis in solid property: it must be such as will be lost or defeated if, and only if, the ship or the goods on board, or both, are lost or damaged by the perils insured against. The specific interest of the assured, or thing which he in particular means to insure, must likewise be named, and the naming of it controls and narrows the general printed formula, so that the surplusage of it beyond that specific thing becomes unmeaning, except as indicating that the interest specified must have a relation either to the ship or the goods (g).

Cargo

§ 91.—We may pass on, then, to the specific written description of the thing insured; and first, of goods and merchandize. These may be described either generally, as "*on goods*," or "*produce*," without defining the species or quality; or, on "100 bales of cotton of such a mark," or the like. It is a mere question of convenience which of these methods shall be adopted. If general words be used, a policy on "goods" covers every description of merchandize, including the hazardous kinds, *i.e.*, such as from their nature are not usually accepted by an underwriter at an ordinary rate of premium, or unless warranted free of particular average. If an underwriter is content to insure "goods," without a particular description, he takes his chance. But, whether the description is general or specific, one thing is to be borne in mind, *viz.*, that a policy on merchandize only covers such merchandize as is

(f) Arn. 238.

Simmonds v. Hodgson, 6 Bing. 114;(g) *Per* Lord Ellenborough in
Robertson v. French, 4 East, 141;

s. c. in error, 3 B. & Ad. 50.

carried in its proper place, viz., below the ship's deck. Goods carried on deck are, by a very old and general custom, not protected by such a policy: it is always necessary, if these are to be insured, that some words be added, such as, "in and over all," "wherever laden," or "including deck-load," to inform the underwriter of the extraordinary risk he is to run. This is so, even in trades in which the carrying of a deck-load is the universal custom, *e.g.*, with cargoes of timber (*h*). If, indeed, the mere describing of the goods insured is enough to inform the underwriter, supposing him, as he ought to be, acquainted with the customs of trade, that it must be on deck, it is not necessary to say more. Thus, where the policy was on "carboys of vitriol," and it was proved that vitriol was never knowingly carried except on deck, the underwriters were held liable for its loss from the deck (*i*).

§ 92.—A policy on *ship* covers her "tackle, apparel, &c.," ^{The ship.} as described in the policy (*j*). This includes provisions put on board for the use of the crew on the voyage (*k*). It does not however include the fishing-tackle in a whaling voyage; that is to say, the harpoons, lances, whale lines, casks, cisterns, boilers, &c., for catching and boiling down the fish; though these belong to the owners of the ship (*l*).

§ 93.—In applying the principles of these decisions to ^{Passenger steamers.} passenger steamers, it seems clear that the coals and engine stores, and provisions for the crew, are part of the ship; but provisions for the passengers are not, being analogous to the appliances for catching the fish (*m*). Permanent passenger fittings, which continue voyage after

(*h*) *Gould v. Oliver*, 2 M. & G. 208.

(*i*) *Da Costa v. Edmunds*, 4 Camp. 142.

(*j*) "Hull and outfit," says Lord Ellenborough, "are both protected by an insurance on ship." (*Hill v. Patten*, 8 East, 374; *Forbes v. Aspinall*, 13 East, 323, 325.)

(*k*) *Brough v. Whitmore*, 4 T.

R. 206.

(*l*) *Hoskins v. Pickersgill*, 3 Dougl. 222.

(*m*) The decision in *Shaw v. Felton*, 2 East, 109, seems opposed to this; but this case can scarcely be regarded as of authority, being clearly opposed to principles now recognized.

voyage, can hardly be distinguished from those structural arrangements of the hull, such as an enlarged saloon, lofty 'tween decks, and the like, which are made especially for the accommodation of passengers; and are therefore treated in practice as part of the ship.

Ballast.

§ 94.—Kentledge, or permanent ballast, is part of the ship (*n*); whether the same holds good of temporary ballast, grain platforms, or dunnage wood, intended only for a particular voyage, may be doubted; the latter are not usually so treated in practice.

Freight.

§ 95.—The profit, or enhanced value of merchandize by being carried in the ship, when the goods are the property of the shipowner, may be insured either under the name of freight (*o*) or of goods. Generally speaking, the method most advantageous to the owner is to insure such profit in the same policy as the goods themselves, and to value both together, describing them as "goods including freight." The same rule applies to insuring advance-freight; it should be in the same policy as the goods, and included in one common valuation, as "goods including advance-freight."

§ 96.—It may be doubted whether an insurance "on freight" covers passage-money. It is more usual to insure passage-money under a distinct name, since the incidents of this risk are in many respects different from that of the freight on merchandize (*p*).

(*n*) *Ingram v. Harrison* in Q. B. Feb. 1856.

(*o*) *Flint v. Flemyng*, 1 B. & Ad. 45.

(*p*) See *Denoan v. Home & Colonial Ass. Co.* (L. R. 7 C. P. 341). This decision is not a satisfactory one. The Court held that the insurance in this case did not cover the passage-money; there was no intention to carry a full cargo: the freight on the goods was 1412*l.*, and was never expected to be more, or for a larger quantity of cargo; and this was valued in the policy at 2000*l.*, and

the whole of it was lost. Only 1000*l.* was insured; and yet, strange to say, the underwriter was held to be liable for something less than 1000*l.* It is not easy to understand the grounds for this conclusion: either the valuation should stand or not stand, and in either case, apparently, the assured would be entitled to recover 1000*l.*, his actual loss having been greater. There was no pretence for saying that the thing to which the valuation was meant to apply was not wholly lost.

Name of the Ship and Master.

§ 97.—Next comes the name of the ship and the master, with the addition, "*or whosoever else shall go for master in the said ship, or by whatsoever other name or names the same ship, or the master thereof, is or shall be named or called.*"

These words protect the assured against innocent mistakes, or against a change of the master *bond fide* made from whatever motive. They do not dispense with the obligation that the goods shall be laden or intended to be laden in the ship thus designated, and that there shall not be a "change of bottom" without necessity. If, indeed, the original ship has been disabled through some peril, or if, for any other cause unforeseen at the time of insuring, it becomes necessary to transfer the goods insured from the original bottom to another, in order to carry them to their destination, the policy protects the goods whilst on board the substituted ship, no less than on that named.

§ 98.—It is now not unusual, particularly with steamers, to find a clause in the bills of lading empowering the owners or their agents to tranship the goods from one steamer to another, or to ship by one instead of another of the same line. In such cases it is prudent, though perhaps not absolutely necessary, to insert in the policy some such clause as "*subject to the conditions of the bill of lading.*" This may not be necessary, when the terms of the bill of lading are so notorious as to constitute a custom of the particular trade.

§ 99.—Sometimes, especially in insuring consignments from abroad, the ship is not named, the goods being insured "per ship or ships." The usual course in such cases is to "declare" the interest, by an endorsement on the policy, as soon as the ship they are to come by is known. Concerning the order in which such declarations follow one another, it may be well here to mention the rule, which is now clearly settled as follows. The declara-

The "bill of lading" clause.

Insurance by "ship or ships."

Effecting of Insurance: duration of risk.

tions made on the policy are always subject to rectification, in case it shall subsequently appear that the advices have come forward, and the declarations have therefore been made, in an order different from that of the actual shipment of the goods. The shipments declare themselves, so to speak, and take rank under the policy in the order in which they occur, so that the declaration written on the policy is merely provisional, and must be set right in case of need (q).

Commencement and termination of the Risk.

§ 100.—The points on which the risk, or liability of the underwriters, begins and ends, are in the next place defined by the following clause:—“*Beginning the adventure upon the said goods and merchandizes from the loading thereof aboard the said ship* , *upon the said ship, &c.,* , *and shall so continue and endure during her abode there upon the said ship, &c., and further until the said ship with all her ordnance, tackle, apparel, &c., and goods and merchandizes whatsoever shall be arrived at* , *upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety, and upon the goods and merchandizes until the same be there discharged and safely landed.*”

This marking out of the termini may appear incomplete ; but it must be remembered that, without any clause at all, the termini are to a great extent defined by the very nature of insurable interest. The points at which that interest is constituted, or begins to exist, have been already set forth in the preceding chapter ; and insurable interest comes of itself to an end, so soon as the risk is over, and the expectation becomes a certainty. Here we have natural limits, which may sometimes cover between them less ground than that allowed by the printed words in

(q) *Stephens v. Australasian Ins. Co.*, L. R. 8 C. P. 18, at 23.

the policy. The interest in the cargo, for example, does not begin to exist until the cargo becomes the property of the assured, which may in some cases be a later period than the loading on board the ship (§ 8): and the interest, whether in cargo or ship, may be terminated by a sale afloat, made without a transfer of the policy (§ 8). Thus the points at which an insurer's liability begins and ends depend, partly on the nature of the transaction, and partly on the words of the above clause, taken in conjunction with the description of the voyage, as "*at and from A. to B.*"

§ 101.—The goods are not insured until the "loading thereof aboard the ship." If, therefore, a merchant desires to cover the risk in boats or lighters from the shore to the ship, he should insert the clause "to include all risk of craft whilst loading." No similar clause is requisite for the risk whilst discharging, if craft are ordinarily employed for the purpose at that place; this being protected by the words "until discharged and safely landed" (*r*). But whenever there is any likelihood that the goods may be landed in craft at a place where that mode of landing is not in the ordinary course of things,—*e.g.*, in Liverpool, where lightering is not usual, yet occurs occasionally in certain states of the tide for the sake of despatch,—the safer course is to provide for this contingency by a special clause.

On merchandise:
risk in
craft.

§ 102.—Concerning the risk in craft, one thing more is to be noticed. The insurance is for the *voyage*, and the voyage, so far as the interests in cargo and in freight are concerned, terminates on the final delivery of the goods by the carrier to the merchant, in such a manner as to entitle the former to his freight. This may sometimes take place at a point anterior to the "discharge and landing" of the goods. For instance, if the consignee sends his own lighter, and takes delivery of his goods from along-

Termination of risk
in craft.

(*r*) *Matthie v. Potts*, 3 B. & P. 23.

side (supposing this not to be the usual course in the trade), the voyage is thereupon at an end, and the underwriter discharged from liability (s). If, in such a case, the risk in the lighter is to be covered, there must be a special clause to that effect; and further, if there is anything unusual in the transit in such lighter, *e.g.*, if the goods are to be carried in it to a wharf unusually distant from the ordinary discharging place in the port, it will be prudent to make this intention clear on the face of the policy. The printed form of policy, as a rule, covers whatever is customary in the voyage described, but nothing beyond.

Goods
laden pre-
viously to
commence-
ment of
risk.

§ 103.—Since the policy is on goods from A. to B., “beginning the adventure from the loading thereof aboard the ship,” the policy implies on the face of it that the goods are to be laden at A., or at some one of the ports of departure therein named. Hence, a policy in the ordinary form does not cover goods laden in some previous part of the voyage. It has been decided that a policy on goods “from Gottenburg to the Baltic” does not cover goods laden in London and carried thence to the Baltic *vid* Gottenburg (t); and that a policy “at and from the Coast of Africa” does not cover outward-bound cargo remaining on board the ship at the time of her loss on the African coast (u). In such cases, the broker’s duty (v) is to insert words to express the peculiarity of the risk, such as “wheresoever laden,” or, in African voyages, usually, “outward cargo to be considered homeward interest twenty-four hours after the ship’s arrival at her first port of discharge” (w).

§ 104.—This is no doubt a severe rule, and the Courts will relax it whenever they can find a reasonable pretext

(s) *Sparrow v. Carruthers*, 2 Str. 1236; *Strong v. Natally*, 1 B. & P. N. R. 16.

(t) *Spitta v. Woodman*, 2 Taunt. 416.

(u) *Rickman v. Carstairs*, 5 B.

& Ad. 651.

(v) *Ante*, § 65.

(w) These words are sufficient to take the case out of the rule in *Rickman v. Carstairs*. *Joyce v. Realm Ins. Co.*, L. R. 8 Q. B. 580.

for doing so. Thus, where a *part* of the goods were landed and reladen at the port of departure named in the policy, sufficiently to inspect the remainder (*x*); where the policy was expressed to be "in continuation of another policy (*y*); and, even, apparently, on no stronger ground than because the ship and cargo had changed hands by a sale at the port of departure named in the policy (*z*); the Courts refused to enforce the rule. Yet the rule is after all founded on common fairness: in insuring goods from the port of A., and likewise from the loading of them on board, the underwriter is in effect told that the goods are to be laden at A.,—and the risk is less on goods so laden than on goods remaining on board from a previous passage, not only because the risk *at* A. is of shorter duration, but on account of the risk, in the latter case, of the goods having been unsuspectedly damaged in some earlier part of the transit.

§ 105.—Between the termini, the policy protects the goods during the whole time, not on shipboard merely, but whilst they are in a warehouse at an intermediate port, always supposing they are put there legitimately, as, from some unforeseen necessity, or because a landing and transhipment falls within the regular course of the voyage insured (*a*). This is the effect of the words, "and so shall continue and endure until," &c. There may, however, be exceptional cases in which the voyage consists of two distinct parts with a break between; in which case the goods may not be insured at all during that break (*b*).

On goods :
continu-
ance of
risk.

(*x*) *Nonnen v. Kettlewell*, 16 East, 176.

(*y*) *Bell v. Hobson*, 16 East, 240. "If there be anything to indicate," said Lord Ellenborough, "that a prior loading was contemplated by the parties, it will release the case from that strict construction." The indication, however, must be something apparent on the face of the policy. (*Joyce v. Realm Ins. Co.*, L. R. 8 Q. B. at 584.)

(*z*) *Carr v. Montefiore*, 33 L. J. (Q. B.) 57, 256; 5 B. & S. 408.

(*a*) *Harrison v. Ellis*, 7 E. & B. 465; *Pelly v. Royal Exch. Ass. Co.*, 1 Burr. 341; *Brough v. Whitmore*, 4 T. R. 206. The rule is of course the same for ship's materials, when landed for a temporary purpose. See *Arn. Ins.* 391.

(*b*) An example of this is given in the *Australian Agricultural Co. v. Saunders*, L. R. 10 C. P. 668.

On ship :
commence-
ment of
risk.

§ 106.—With regard to the ship, the blank space left in the policy after the words “upon the said ship, &c.,” were no doubt intended to be filled up with the date or period from which the risk was to commence; but this is seldom or never done, nor is it now necessary. The risk insured is “at and from the first port named in the policy, and it has been decided that the risk begins immediately upon the ship’s arrival at A., in good safety (c). Thus, where a ship, whilst entering the harbour of Havannah, and before she had cast anchor at the place intended, but when she was within the precincts of the harbour, grounded and received damage, it was held that the underwriters on a policy “at and from Havannah” were liable (d). But she must have arrived at the place itself, not merely the “port of the place,” i.e., the custom-house district which may include the place ordinarily known by that name and other places besides,—e.g., if the insurance be at and from Lyme, it is not enough

Wool was insured “at and from the river Hunter for ships and steamers, and thence per ship or ships to London, including the risk of craft from the time that the wools are first water-borne, and of transhipment or landing and reshipment at Sydney.” This wool was not carried under through bills of lading, but was sent to Sydney under contracts of affreightment which terminated there. It was then placed in a stevedore’s warehouse, for the purpose of being “dumped” or cleaned, and made into smaller bales; and while there was destroyed by fire. Here the Court of Appeal held that the time when the goods were thus in store formed no part of any act of “transhipment or landing and reshipment” (at p. 674). Blackburn, J., said that to make the underwriters liable for the risk of fire while the

wool is in a warehouse or store, there must be express words or some custom by which the period while the wool was so warehoused could be considered as part of the voyage (at p. 676). There were in fact in this case two distinct voyages, having no real connection with one another, beyond the being insured in the same policy.

(c) She must arrive in the port in a state of sufficient repair or seaworthiness to be enabled to be there in safety. (*Haughton v. Empire Mar. Ins. Co.*, L. R. 1 Exch. 206, at p. 210, and see *Parmeter v. Cousins*, 2 Camp. 234, and *Bell v. Bell*, 2 Camp. 475.) This requisite, however, belongs rather to the head of seaworthiness than to the question of date of commencement.

(d) *Haughton v. Empire Mar. Ins. Co.*, L. R. 1 Exch. 206.

that the ship is within "the port of Lyme," which includes that and other towns (*e*). If, however, the first place named in the policy is an island or district comprehending several ports, as Jamaica, the policy on ship attaches as soon as the ship arrives at the first discharging port within the district (*f*). The distinction evidently is that in the former case the popular and ordinary use of the name refers to the town, and in the latter to the district.

§ 107.—The ship continues protected by the policy so long as she is at the port with reference to the voyage from it to the next (*g*). This includes all time properly taken in discharging the cargo she brings thither, effecting needful repairs, or otherwise making ready for the voyage (*h*). It likewise covers all delay occasioned by accidental causes during these operations; such as the being frozen in for the winter or the like. It does not, however, include delays not necessary for the ultimate performance of the voyage (*i*); if, for instance, the ship is kept in port in order to be employed as a hulk there.

§ 108.—The only point, connected with the duration of the risk on ship, which is determined with precision on the face of the policy is a purely arbitrary one—viz., the date when the risk ends,—when she "hath moored at anchor twenty-four hours in good safety."

The mooring must be at the place of final discharge of either the whole or a substantial part of the cargo (*j*).

(*e*) *Constable v. Noble*, 2 Taunt. 403.

(*f*) *Camden v. Cowley*, 1 W. Black. 417. The policy is in this case determined at this point, from which it may reasonably be inferred that a policy the other way would at this point attach.

(*g*) One apparent exception to this rule, based on a custom of the trade, occurs in the Newfoundland fishery. There it is or was usual for the ships, after arriving off the coast of Newfoundland, to go "a

banking," i.e., fishing along the banks, before setting out on their homeward voyage. An insurance on the ship "at and from Newfoundland" to an English port, is understood not to begin to take effect until the vessel returns from her banking. (*Vallance v. Dewar*, 1 Camp. 503.)

(*h*) *Phillips v. Irving*, 7 M. & G. 328.

(*i*) *Palmer v. Fenning*, 9 Bing. 462.

(*j*) If, from whatever motive, the

On ship :
continu-
ance of
risk.

On ship :
termina-
tion of
risk.

Mooring.

This means the dock, or place equivalent to a dock, but not necessarily the quay-berth. Coming to anchor in the river Thames, with intention of entering a dock when the tide shall serve, is not a final mooring (*k*). But if she enters the dock, or comes to the wharf, where her cargo is to be landed, and is lashed alongside of other vessels, waiting her turn for a quay-berth, that brings the policy to an end (*l*). Where a ship was chartered to Wallasey Pool in the river Mersey, or so near thereto as she could safely get, and was insured "to her discharging berth in the United Kingdom;" and the ship, drawing too much water to go up the Pool, discharged a large portion of her cargo in the river, and was then driven ashore and wrecked in a gale, it was held, the jury having found that "a substantial part" of her cargo was discharged in the river, that the policy was off twenty-four hours after she was moored there (*m*). This, however, must be regarded as a somewhat exceptional case.

Mooring
in good
safety.

§ 109.—And she must be so moored "in good safety." Where a ship arrived so leaky that she was lashed to a hulk to prevent her sinking, and actually did sink three days afterwards, the policy was held not to have expired (*n*). Good safety does not mean that she needs no repairs, but that she must be safe enough for the port and her actual circumstances at the time; so that "she can keep afloat in harbour sufficiently for the purpose of being repaired" (*o*).

voyage is given up, or put an end to at some port short of the place of destination named in the policy, the policy comes to an end immediately that resolution is come to. (Arn. Ins. 424.)

(*k*) *Samuel v. Royal Exchange Ass. Co.*, 8 B. & Cr. 119. And where a ship which had been for a short period moored to a wharf was within the twenty-four hours ordered off to quarantine, and whilst there, but more than twenty-four hours

after the original temporary mooring, was lost by a peril insured against, it was held that the policy had not expired. (*Waples v. Eames*, 2 Str. 1243.)

(*l*) *Angerstein v. Bell*, 1 Park. Ins. 54.

(*m*) *Whitwell v. Harrison*, 2 Exch. 127.

(*n*) *Shawe v. Felton*, 2 East, 109.

(*o*) *Annen v. Woodman*, 3 Taunt. 299; see also *Lidgett v. Secretan*, L. R. 5 C. P. 190.

§ 110.—This state of good safety refers only to the time of mooring, not to the twenty-four hours which follow. This little addition, as well as the fifteen or thirty days to which it is occasionally increased by a special clause, is treated as a time-policy engrafted on a voyage-policy (oo). Hence, if the ship is in good safety at the time of mooring, she may cease to be in safety before the twenty-four hours have run out, and yet the policy will lapse at the end of them (p). For twenty-four hours.

With regard to time-policies generally, the precise date of commencement and termination is always named in the policy. It is only necessary to observe that, the policy being a contract entered into between landmen in England, civil not nautical time, and English time, not the time of the place where the ship may happen to be, is the criterion (q). The day, unless otherwise expressed, begins and ends at midnight.

§ 111.—The Stamp Act directs that no policy shall be effected for a longer period than a twelvemonth (r).

§ 112.—With regard to other subjects of insurance besides merchandise and ships, the policy is silent as to the date of commencement and termination; this, therefore, must be determined by the nature of the interest, as already set forth. The rule for all such insurances is, that, unless limited by the description of the voyage in the policy itself, the policy protects such an interest from the time when it is constituted or begins to exist until it has ceased to be exposed to the perils insured against. Duration when not expressed.

(oo) When the words "and 30 days" are added in the policy, these give an extension of 30 days in addition to the 24 hours. (*Mercantile Mar. Ins. Co. v. Titherington*, 5 B. & S. 765.)

When the policy is "from A. to B. and for thirty days while at B." it is clear that the ship is only protected while she is in fact at B.: therefore, if after arrival at B., B.

being an open roadstead, the ship is blown out to sea in a gale, or has to slip her anchor and run out to sea, the underwriter would not be answerable for any damage she may suffer whilst at sea, or until she has returned to B.

(p) *Lidgett v. Secretan*, L. R. 5 C. P. 190, at 199.

(q) *Arn. Ins.* 428.

(r) 30 Vict. c. 23, § 8.

Valuation of Interest.

§ 113.—Valuations of merchandise may be made either in the lump or in detail ; at so much per bale or package if the quantity is unknown ; or on the invoice cost, with a specified percentage added, or at a specified rate of exchange for the foreign money, at a rate that shall cover the expected profit.

The Premium.

Policy contains receipt for premium.

§ 114.—Returning now to the printed form of policy, and, as heretofore, taking its clauses in the order in which they occur, we come in the next place to the enumeration of the perils insured against, and then to the “sue and labour clause.” The topics involved in these two clauses are reserved for a fuller consideration. Then follows a clause which at the present day may be regarded as of purely antiquarian interest, being a promise by the underwriters that their engagement shall be as binding on them as if it had been made in Lombard Street, or on the Royal Exchange, or anywhere else in London. And this promise they make, “*confessing ourselves paid the consideration due unto us for this assurance by the assured, at and after the rate of* .” This receipt given for the premium raises the questions which we are now to consider : and it is the last clause in the policy to be dealt with in this chapter ; since what follows it, “the memorandum,” as it is called, is to be discussed later.

Effect of this.

§ 115.—The underwriter acknowledges, then, that he has received the premium ; as no doubt in old times it was usual to pay the premium in cash at the time of insuring ; and this acknowledgment is binding on him, in spite of any proof that may be offered to show that the premium has not in fact been paid. Hence, it follows that an underwriter cannot sue the assured for unpaid premiums, nor can set them off against an action brought by the assured for a loss ; and further, that in case the assured shall for any

reason be entitled to a return of premium, the underwriter cannot set up as a defence that the premium has not yet been paid (s).

§ 116.—But the employment of an insurance-broker, and the introduction into insurance business of a system of credit, raise complications. The system which for many years has prevailed at Lloyd's is followed in the main with modifications in the other parts of this country where insurance is practised on a large scale; and the legal effects of this system have been settled by numerous decisions, the results of which must here briefly be summed up.

§ 117.—The usual course, then, is, that the insurance-broker, acting as a sort of financial medium between assured and underwriters, opens a double set of credits. In dealing with the assured, he debits him with all the premiums, holding the policies as his security, collects any losses, credits the assured with the amounts thus recovered on his behalf, and makes periodical settlements of the balance. In dealing with the underwriters, he opens a separate account with each of them, crediting him with the premiums and debiting him with any losses, and making periodical settlements of the balance. By this means, as in transactions at the Clearing House, business is carried on with a great economy of capital. This is the general system, though naturally there often are modifications in particular cases (t). Sometimes, for example, the assured prefers to pay the premiums in cash, and retain the policies in his own hands.

§ 118.—Under this system, the legal relations of the three parties are as follows:—The broker is the agent of the assured, to pay for him the premium, as if in cash, to the underwriter, and likewise, provided the policy remains

(s) *Dalzell v. Mair*, 1 Camp. 532; *C. B. (N. S.)* at 456.
De Gaminde v. Pigou, 4 Taunt. 246; (t) For a fuller account of this
Power v. Butcher, 10 B. & Cr. 329; system, see *Arn. Ins.* 191—195.
 and see *Xenos v. Wickham*, 14

in the broker's hands, but not otherwise, to receive for him from the underwriter any losses that may be due (u). The broker's authority in this latter respect was at one time supposed to be limited to the receiving of these losses in cash, or money; but later decisions have modified this to a certain extent, and it is now the law that, if it can be proved that the assured was cognizant of the customary mode of dealing at Lloyd's, as above described, he must be taken to have assented to it as a term of his bargain, and consequently that in such a case the broker is acting within the scope of his authority, as agent for the assured, in receiving losses, not in cash, but as part of a general settlement in account. This is not so, however, if it cannot be shown that the assured, at the time of entering on the transaction, was cognizant of the Lloyd's custom as to settlements in account; in that case, as the assured, had he retained the policy in his own hands, could have claimed from the underwriter a settlement of the loss in money, he has a right to require that the broker, acting as his agent, should collect the loss in the same way, or treat his principal as if he had done so (v).

§ 119.—The broker is agent for the underwriter, to collect for him, as if in cash, all premiums due, and to pay over to the assured whatever losses the underwriter has been debited with in the account between him and the broker.

The direct relations between the assured and underwriter have been already defined (§ 115). The underwriter has no direct claim on the assured for premiums, but is directly liable for returns of premium and losses to the holder of the policy, whether assured or broker.

All that now remains is to consider the effect of these legal relations under the various contingencies that may arise.

(u) *Power v. Butcher*, 10 B. & Cr. 329.

(v) *Arn. Ins.* 197—203, and cases there cited.

§ 120.—If the assured, whether through insolvency or ^{Failure of assured.} for any other reason, fails to do his part, that is to say, to pay the premiums due to the broker, the broker in the first place has a lien on all policies in his hands belonging to the assured for his general balance (*w*); and he likewise has a right to sue, or rank on the estate of, the assured, for the balance due to him,—the acknowledgment given by the underwriter not availing as against the broker. It must be taken, in short, that the assured has empowered the broker to pay the premium for him, that the broker has done so, and that the broker now requires repayment from his principal (*x*).

§ 121.—If the underwriter fails, the loss must fall on the assured (*y*). The broker is simply his agent, ^{Failure of underwriter.} bound indeed (see § 65), to use due diligence to obtain none but solvent underwriters, but not, in his mere capacity of broker, guaranteeing their continued solvency. Sometimes, however, such guarantee is given by the broker; but as a distinct contract, for which he is paid by what is called a *del-credere* commission. Thus, the broker, apart from any such special guarantee, is not affected by the failure of an underwriter, except indirectly, so far as such failure may affect the value of a policy on which he has a *lien*, which, of course, is not material, provided the assured is solvent.

§ 122.—Greater complications may arise, in case it is ^{Failure of broker.} the broker who fails. First, as to the position of the assured:—We are to suppose that the broker owes him money; which can only be, in case the broker has received from the underwriters payments for losses, to an amount exceeding that which the assured owes the broker for

(*w*) *Ollive v. Smith*, 5 Taunt. 55. Arn. Ins. 210.

(*x*) *Power v. Butcher*, 10 B. & Cr. 329, at 347; *Xenos v. Wickham*, 14 C. B. (N.S.) 452.

(*y*) Unless, indeed, the broker

has actually paid over a claim to the assured before collecting it from the underwriters; in which case there can be no refund. (*Edgar v. Bumstead*, 1 Camp. 411.)

Effecting of Insurance: the premium.

premiums. Can the assured, in such a case, claim that the underwriters shall pay those losses a second time, on the plea that the debt was due to *him*, and has not yet been paid to him? This must depend on whether the broker, in receiving those payments from the underwriter, acted within the scope of an authority given him by the assured. If the broker received those payments in money, he at the time holding the policy,—no matter whether he held it under a right of lien, or because it had been handed over to him by the assured for the purpose of collecting the loss,—it is beyond doubt that the broker has acted within the scope of his authority; in which case the underwriter cannot be called on a second time (z). If the underwriter has paid the broker without having the policy produced, he has done so at his peril, and may have to be punished for his negligence by being made to pay a second time. If the underwriter has paid the loss, not in money, but in a settlement of account, in the manner already described (§ 117), the question whether he can be called upon a second time must depend on whether the assured has impliedly given to the broker an authority to collect losses from the underwriter in that manner; and this again depends, as has been shown (§ 118), on whether the assured can be proved to have been cognizant of the customary method of dealing at Lloyd's in this matter (a). Thus, the law presents the seeming anomalies of offering a premium for ignorance; seeming, not real; for a man who knows what the custom is, if he does not like it, or choose to run the risk, can always secure himself by stipulating with his broker that losses are to be paid over to himself direct.

The position of the underwriter, if the broker fails owing money to him, is simply that he loses all beyond his dividend; for, as has been said, he has no claim upon the

(z) *Scott v. Irving*, 1 B. & Ad.
605.

C. 760; *Andrew v. Robinson*, 3
Camp. 199.

(a) *Bartlett v. Pentland*, 10 B. &

assured for unpaid premiums, nor can he set off, against the payment of a loss, the amount due to him for premiums; for the payment for loss is due to the assured, whilst the premiums are due only from the broker (*b*).

The Stamp.

§ 123.—A policy not duly stamped is not good or available in any court of law. The provisions of the Stamp Act, therefore, have to be strictly observed (*c*).

In stamping policies, where several distinct interests are insured together, care must be taken to affix a sufficient stamp, by computing, for each interest separately, the fractional part of a hundred pounds as if it were 100*l*. For example, if three interests of 510*l*. each are insured together in one policy, the proper stamp is not for 1600*l*., but for 1800*l*. (*d*).

§ 124.—A policy may, however, for the purpose of being given in evidence, be stamped after execution on payment of the penalty of 100*l*. (*e*).

§ 125.—Alterations, of course with the consent of both parties (*f*), may be made in a policy, after subscription,

(*b*) Arn. Ins. 192, and see p. 219.

(*c*) 30 & 31 Vict. c. 23, § 9. The Stat. 30 & 31 Vict. c. 23 enacts as follows:—

§ 7. "No contract or agreement for sea insurance (other than such agreement as is referred to in § 52 of the Merchant Shipping Act Amendment Act, 1862) shall be valid unless the same is expressed in a policy; and every policy shall specify the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured; and in case any of the above-mentioned particulars shall be omitted in any policy, such policy shall be null and void to all intents and purposes."

"A policy" is defined by § 4 to mean, "any instrument whereby a contract or agreement for any sea insurance is made or entered into."

Since a policy may now be stamped at any time on paying a penalty of 100*l*., the question may be raised whether a slip or covering-note can be so stamped as to become a policy within this section. This may here be left as a question of curiosity.

(*d*) See 30 & 31 Vict. c. 23, Schedule (B).

(*e*) 39 Vict. c. 6, § 2.

(*f*) As to the effect of alterations made without mutual consent, see Arn. Ins. 265—267: the short result is, that such alterations, if material, vitiate the policy.

F

without requiring a new stamp; subject to this proviso, that the alteration must not be such as to create an entirely new contract, upon a different subject-matter from that originally stamped. Thus, a warranty may be expunged, and that even after the breach of it has occurred (*g*); the voyage may be changed by adding alternative parts of destination (*h*); a mistake, perhaps of any kind, may be rectified (*i*) without a new stamp. But where a policy "on ship and outfit" was altered into one "on ship and goods," this, being as to the goods a new contract, was held to require a new stamp (*j*).

Insurance by several Policies.

§ 126.—Each policy, though signed by several underwriters, each engaging for himself alone, is in law for many purposes regarded as one entire contract. But there may often be several policies on one subject-matter: and this gives rise to questions which must here be considered.

Supposing that the amount of interest is known from the outset,—as for example when the owner of the ship resolves to insure 10,000*l.* on his ship which he values at 10,000*l.*, he may either insure that amount in a single policy, or in half a dozen, suppose for amounts varying from 3000*l.* to 1000*l.* each. The result to him in every combination of circumstances, ought to be, and is, precisely the same, whichever method he adopts.

If he wishes to leave a portion of the risk uninsured, he may insure, suppose 9000*l.* on the ship valued at 10,000*l.*, and then he becomes himself an underwriter for one-tenth, recovering nine-tenths only of any loss.

§ 127.—Suppose, next, that the amount of interest is

(*g*) *Kensington v. Inglis*, 8 East, 273, at 291.

(*h*) *Ramstrom v. Bell*, 5 M. & S. 267.

(*i*) Arn. Ins. 271, and cases there

cited.

(*j*) *Hill v. Patten*, 8 East, 373.

As to alterations generally, see 30 & 31 Vict. c. 23, § 10.

not thus determined at the time of insuring. This may be, either because the quantity or value of the goods on board are not known at the time of insuring, as when the insurance is effected by the consignee ; or because of some change of circumstances, as when an intention to ship goods is not carried out ; or simply because the assured chooses to insure by open or unvalued policies. In all such cases, before any claim can be made on the policies, the first thing to be done is to determine the amount of interest.

§ 128.—Where there are several policies, and the amount of interest is less than the total sum insured, the rule of practice and indeed of law in England is,—subject to one exception (§ 131),—that all the policies, irrespective of date, share in that interest alike. The assured has indeed the privilege of claiming in the first instance from whichever policy or policies he pleases ; but, when he has exerted this privilege, the several underwriters, by a contribution amongst themselves, are placed on an equality. Suppose, for example, there are two policies on goods, each for 2000*l.*, and the interest of the assured proves to be 3000*l.*, he may, at his option, claim 2000*l.* under the first policy and 1000*l.* under the second, or conversely : but the two sets of underwriters afterwards arrange the matter so that eventually each policy pays 1500*l.*

§ 129.—Another complication arises, when the valuation of the interest is higher in one policy than in the other : for example, if one policy is for 3000*l.* on the ship valued at 4000*l.*, and another for 2500*l.* on the ship valued at 5000*l.* In such a case the assured has only to make his claim first on the lower valued policy, and, as has already been pointed out (§ 50), he may recover to the extent of that higher value ; but beyond that he cannot go.

§ 130.—Successive voyage policies on a ship overlap one another for a certain period ; the one policy continuing for twenty-four hours after mooring, and the other attach-

Effecting of Insurance: where several policies.

ing immediately upon arrival *at* the place, even before mooring there. During the first twenty-four hours, therefore, there is always a double insurance (*k*): and if a loss takes place within that period, each policy, though the assured may in the first instance claim the whole loss under either, eventually pays the half.

§ 131.—To this rule of joint sharing in the risk there is one exception, viz., if the policy first executed has at one time stood alone upon the risk, and might have been liable for the whole, that policy shall throughout take priority over those executed subsequently (§ 55).

(*k*) This is frequently obviated by inserting in policies the special clause: "The interest in this policy to attach on the expiration of previous insurances on the same subject-matter."

CHAPTER III.

CAUSES WHICH RENDER A POLICY VOID.

Introduction.

§ 132.—If the preceding chapter be regarded as showing how an insurance ought to be made, the chapter now before us is to form its natural sequel or complement, as showing how an insurance ought *not* to be made; in other words, what faults, mistakes, or omissions will deprive the assured of the benefit of insurance, rendering the policy void.

§ 133.—Speaking generally, if the assured or his agent has not furnished the underwriter, at the time of insuring, with the materials for correctly appraising the risk he is to run, no matter whether this omission has been morally culpable on the part of the former, the policy will be of no effect whatever, becoming void as a contract, either from the very beginning, or from the point at which the risk becomes different from that which the insurer had a right to expect. This principle regulates the law of concealment, misrepresentation, deviation, breach of warranty, and unseaworthiness. These heads, indeed, simply mark out the principal instances of omission to supply the underwriter with materials for correctly estimating the risk he is to run.

Some safeguard of this kind, involving a heavy penalty, is evidently necessary in order that a law of insurance may carry into effect that which was pointed out in our Introduction as the second main purpose of such a law, namely, that insurance may be conducted economically, or without waste. In the interests of trade, the rates of premium

ought to be as low as they can be, so as to be remunerative. A margin, or extra rate, added on in order to cover preventible uncertainty, arising from negligence or want of precision in describing the conditions of the risk, would represent a tax on commerce,—a tax, not levied by government for some useful purpose, but exacted from the general body of mercantile men for the exclusive benefit of those among them who were careless or dishonest. This evil can only be prevented by rules of a certain wholesome severity.

It might be thought, perhaps, that some safeguard less stringent than that of a total forfeiture of the benefit of insurance might be sufficient for the purpose, at least in cases where the assured was innocent of any intention to defraud. One obstacle to lenity, however, lies in the nature of the contract. A penalty, whatever it be, can only be enforced in the comparatively rare instances of a loss or claim on the policy. In cases of safe arrival the offence is not detected. It may happen, therefore, that for want of a due describing of the risk, a merchant may go on for a series of voyages, perhaps for years, paying a lower rate of premium than he ought to have paid; and it is only when a loss occurs, and when it is of course too late to rectify the mischief as to any previous policies, that the error is detected. The penalty thus occasionally inflicted, to be effectual, must be exemplary.

The subject of the present chapter is throughout to be regarded, therefore, as a sort of penal legislation, justifiable and indeed necessary in order to maintain the requisite precision in carrying on insurance, and perhaps only when thus regarded reconcileable, at all points, with natural justice.

§ 134.—The simple, universal, and only penalty known to the law of insurance is, that the policy becomes void. Where this penalty is incurred, it matters not whether the loss or damage claimed has been occasioned by, or is in any way connected with, the error or misconduct in

question. If the assured has failed in the duties preliminary to the insurance, by undue concealment or misrepresentation of material facts; or in the duties incident to the exact setting forth of the risk in the policy, as by deviation or breach of warranty; or in the duties unexpressed, but tacitly understood, of having a seaworthy ship and conducting the navigation in a lawful manner; in any of these cases the contract intended either never has existed or has ceased to exist, and as the law will not *make* a contract for him, the party who intended to insure is simply left in the position of having no insurance.

If the penalty is simple and uniform, so likewise, if traced to the bottom, is the offence. The offence is, in every case, a failure to perform the duty universally incumbent on the assured, of supplying the insurer with those materials for correctly appraising the risk he is to run, which, being particular and not general, are within the exclusive knowledge of the assured. This failure must now be considered, first as it has reference to the preliminaries, secondly to the express, and thirdly to the implied, conditions of the contract.

1.—*Concealment.*

§ 135.—For the preliminaries, the rule is briefly this: the assured must not mislead the underwriter as to the risk to be run, either by saying too little, or by saying what is not true. We begin with the first of these.

An underwriter has a right to expect, as the condition of his entering into the contract, a full and true disclosure of all the circumstances that affect the risk. So far as matters of general information are concerned, the mere naming of the thing to be insured, the ship, and the voyage, with other particulars contained in the order to insure, are in the great majority of cases all that is needed; since it is the business of the underwriter to appraise such risks, and the law reasonably supposes him to have the knowledge needful for carrying on his business. The assured,

General principle.

to use the words of Lord Ellenborough, "is not bound to make a laborious disclosure of what is known to all" (a). Therefore whatever in the common course of things belongs to the particular voyage or risk proposed, an underwriter may be taken to know already. But if the intending assured knows of some fact, or even of some rumour, which he has reason to believe the underwriter knows nothing about, and which if he did know would naturally induce him either to decline the risk or ask a higher premium, this fact or rumour he is bound to disclose. Insurance in this respect differs from buying and selling. The vendor may not in all cases be bound to disclose to an intending buyer the faults of the article he offers for sale: but then the buyer can ordinarily look at it, and judge for himself. In insuring, since many facts on which the risk depends are within the exclusive knowledge of the assured, the only way by which a bargain fair to both parties can be ensured, is by obliging the assured to put the underwriter on an equal footing as to such knowledge with himself (b).

Testing
question.

§ 136.—This rule is not to be carried beyond the bounds of good sense. It is well known that the ordinary scale of premiums is fixed somewhat roughly, with a disregard of minute differences as to the degree of risk. There are ordinary variations which an underwriter deliberately ignores. A fact or a rumour may affect the risk, yet may affect it so slightly as not to influence an underwriter of ordinary judgment either to decline the risk or ask a higher premium. Such insignificant matters, therefore, may not affect the validity of an insurance; and, while the assured in case of doubt will do well to take the safe side, an underwriter cannot dispute his liability under the plea of concealment, unless he is prepared to show that the matter concealed was such as would have induced an under-

(a) *Vallance v. Dewar*, 1 Camp. 503.

(b) See the judgment of Lord Mansfield in *Carter v. Boehm*, 3

Burr. 1905, for a full exposition of the principles which govern the subject of this section.

writer of ordinary judgment to decline the risk on the terms offered.

§ 137.—The following examples may suffice to illustrate **Examples.** these two principles:—The date of the ship's sailing on the voyage insured, as a rule, need not be disclosed to the underwriter: but if the date seriously affects the risk, as showing that she ought already to have arrived, or for some other reason (*c*), the assured is bound to communicate all that he knows about it. It was formerly supposed that this was not necessary unless the ship was at the time of insuring what is called "a missing ship"; but a more precise and reasonable rule has recently been laid down, viz.—that the true test is whether at the time of insuring the ship has been so long at sea that a reasonable underwriter would consider the risk a "speculative one," that is to say, a risk which he would not take at the ordinary premium (*d*). So if it is known that other ships which sailed after her on the same voyage have arrived before her, this fact need not be disclosed if those ships are faster sailers than she, so that the circumstance is immaterial; otherwise the underwriter must be informed (*e*).

(*c*) As for instance in changing the risk from a summer to a winter risk. Concerning this it is to be noted that when an order is given to insure for a voyage from a port named, there is an implied understanding that the vessel shall be there within such a time that the risk shall not be materially varied, otherwise the risk does not attach. If, therefore, at the time of insuring, the assured knows that the ship will not be at the port of loading for some time, and that this circumstance will materially vary the risk, he must disclose it. It matters not whether the delay be voluntary or results from some accident on the outward passage. And it seems that a variation of this kind would

vitate the policy, not simply on the ground of undue concealment, but as the breach of an implied warranty. The practical conclusion is, that whenever a ship or goods are insured homewards, on any voyage as to which the time of year is material to the risk, at a time when the ship is still on her passage out, it would be prudent to communicate this fact to the underwriter. (*De Wolf v. Archangel Ins. Co.*, L. R. 9 Q. B. 451.)

(*d*) *Stribley v. Imperial Mar. Ins. Co.*, 1 Q. B. D. 507; to this extent modifying *Elton v. Larkins*, 5 C. & P. 385.

(*e*) *Littledale v. Dixon*, 1 B. & P. N. R. 151; *Rickards v. Murdoch*, 0 R. & Cr. 527.

If the assured has advices of the ship's having been seen in distress, or in circumstances of danger, or of a storm having occurred in a place where the ship was or was likely to be, or of any similar occurrence out of the common course which would enhance the risk, he is bound to lay what he knows before the underwriter (*f*). He is to bear in mind that what is important is not the event,—as whether the ship is lost in that particular storm or not,—but the effect which the intelligence may reasonably have on the mind of the underwriter at the time. For this reason it is immaterial whether the report prove true or false (*g*). Even if he can at once prove it to be false, it has been said, and no doubt rightly, that he is bound to communicate it, so as to give the underwriter the opportunity of determining whether, after the disproof, he attaches any weight to it or not (*h*).

Facts bearing on seaworthiness.

§ 138.—It is unnecessary, in general, to inform the underwriter concerning any particular circumstances of the ship's condition with respect to repairs or equipment, as for instance whether she has been lately coppered, what repairs she has received and how long ago, or other such matters tending to show that the ship is more or less eligible as a risk; although, if any question is put by an intending underwriter on such points, the assured is bound to answer truly (*i*). Nor is it necessary, in insuring for the homeward voyage, to mention damage that has occurred on the outward (*j*). The reason is that the underwriter is not on the risk at all, unless the ship sails seaworthy, and seaworthiness is all he has a right to expect; the more or less she has of fitness for the voyage, above this point, is a variation which he ordinarily takes his chance of. The assured need not communicate information con-

(*f*) *Westbury v. Aberdeen*, 2 M. & W. 267.

(*g*) *Seaman v. Ponereau*, 2 Str. 1183; *Lynch v. Dunsford*, 14 East, 494.

(*h*) 2 Duer, Ins. 393.

(*i*) *Haywood v. Rogers*, 4 East, 590.

(*j*) *Shoolbred v. Nutt*, Park Ins. 493, 8th edit.

cerning her seaworthiness, because he warrants her seaworthy (*k*).

§ 139.—It was at one time supposed that a concealment could be excused, by showing that the matter kept back was such as the underwriter had the means of knowing, and might and ought to have known, it being recorded in Lloyd's List, a paper which underwriters use in their daily business. But a recent decision in the Court of Appeal has laid down a more sensible rule. The assured, we must now take it, cannot shield himself from not communicating what he knows, and what his own attention has of course been specifically directed to, on the plea that the underwriter might have read it in a newspaper. "To hold," said Bramwell, L.J., "that the underwriter is bound to carry in his head all that is contained in Lloyd's List relating to a ship in which he has no interest, rather than to hold the owner of the ship bound to disclose it, would be to put a difficult and needless burden on the underwriter, while the opposite view puts no difficulty at all in the way of the owner" (*l*). To excuse the concealment, then, it must be proved to the satisfaction of the jury that the matter in question was actually known to the underwriter.

§ 140.—The mode of communication should be sufficiently specific to bring the augmentation of risk fairly before the mind of the underwriter. The use of general

Of facts recorded in Lloyd's List.

Communication should be specific.

(*k*) In time-policies, where there is no warranty of seaworthiness, a fuller disclosure may be requisite. Thus where a time-policy was effected shortly after the receipt of a letter from the captain, stating that the ship had been ashore, was shaken and very leaky, and had been taken in a sinking state to Carthagena for repair, the non-disclosure of this letter was held to vitiate the policy. A doubt was thrown out as to whether it would

not have had the same effect even on a voyage-policy. (*Russell v. Thornton*, 4 H. & N. 788.) The doctrine laid down in this § must of course not be so applied as to be inconsistent with the general principle, that facts out of the common course, known only to the assured, and materially affecting the risk, must be communicated.

(*l*) *Morrison v. Universal Marine Insurance Co.*, L. R. 8 Exch. 40, at p. 54.

terms, such as would veil or soften the danger apprehended, borders on fraud, and is, to say the least, hazardous. If it is known, for instance, that the goods are to be laden at a place particularly dangerous, it would not be enough to inform the underwriter that they are to be laden within a district comprehending this and other safer ports (*m*).

Concealment by agents.

§ 141.—Further, it matters not whether the concealment be the act of the assured, or person really interested in the insurance, or of some agent of his. The principle is, that the underwriter is entitled to assume, as the basis of his contract, that the assured has communicated to him every material fact, not only which he knows, but which he ought to have known. A suppression of the truth by an agent inflicts an injury on the underwriter, by inducing him to enter into a contract which otherwise he would not have engaged in, no less than on the assured, by leading him to believe himself insured when he is not: and when one of two innocent parties must be a loser through the fault of a third, the just rule of law is, that the loss shall fall on him who trusted that third party, and so put it into his power to commit the wrong. Hence, where an agent, the shipper of goods, who ought to have telegraphed to the owner the news of the ship's loss, purposely abstained from doing so, and sent the news by post, in order to give his principal time to insure, the insurance was held void (*n*).

The penalty for concealment.

Policy is voidable, not void.

§ 142.—The penalty for concealment, generally speaking, is, that the policy is wholly void; or, more precisely, voidable at the option of the insurer on first discovery of the concealment. The underwriter may, if he pleases, elect to condone the concealment and retain his premium; and he must make his election at once. If, after learning of an undue concealment, he does not forthwith give notice to the assured that he means to treat the policy

(*m*) *Harrower v. Hutchinson*, L. R. 4 Q. B. 523; 5 Q. B. 584. And 37; and 2 Duer, Ins. 398 *et seq.*
 (*n*) *Proudfoot v. Montefiore*, L. R. see *Lynch v. Hamilton*, 3 Taunt. 2 Q. B. 511.

as void ; still more, if, having heard of the concealment after initialing the slip, he issues a policy, and thereby leads the assured to believe that he has condoned the offence, and deprives him of the opportunity of effecting a valid insurance elsewhere ; he will not be permitted, after a loss, to avail himself of the plea of concealment (o). Again, in those exceptional cases in which the concealment does not affect the risk as a whole, but only some portion of it which can be detached from the rest ; as, where the captain of a ship improperly concealed from the owner the fact that she had sustained damage on the voyage previously to her being insured ; the insurance will not be treated as wholly void, but as containing an implied exemption from liability for the particular damage which ought to have been disclosed. The court, in such a case, makes the reasonable supposition that an underwriter, had the fact in question been disclosed to him, would not have declined the risk or asked a higher premium, but would have introduced a clause exempting him from liability for that particular damage (p).

§ 143.—It has been laid down in a recent decision that not merely facts which make the risk greater, but facts which tend to excite in the underwriters' minds suspicion of fraud, must be disclosed. Thus, where cargo was very greatly overvalued in the policy, to an extent beyond what would cover any profit on the sale that could reasonably be regarded as possible, and when no intelligible reason was given why this was done, the Court held that, though actual fraud was not proved, this excessive overvaluation was a circumstance the non-disclosure of which vitiated the insurance (q). It was proved at the trial that such a circumstance, if known, would have disinclined underwriters to take the risk at the ordinary premium ; presumably for no other reason than the suspicion of

Facts not enhancing risk, yet exciting suspicion.

(o) *Morrison v. Universal Mar. Ins. Co.*, L. R. 8 Exch. 40, at 55 ; and on appeal, 197, at 205. S. 35 ; and see *Stribley v. Imperial Mar. Ins. Co.*, 1 Q. B. D. 507.

(q) *Ionides v. Pender*, L. R. 9 Q. B. 531.

(p) *Gladstone v. King*, 1 M. &

intended fraud which it would arouse. The propriety of this decision, however, may well be questioned. The assured is able to judge whether a fact within his knowledge is calculated to enhance the risk; but it seems hard to require him to judge what circumstances are calculated to excite suspicions in the mind of an underwriter: and the rule as to concealment, being highly penal, ought to be so precise that an assured shall have no difficulty in understanding and acting upon it (r).

2. *Misrepresentation.*

§ 144.—If the mere *concealment* of a material fact renders a policy void, and this though the concealment be without fraudulent intent, and the doing of a mere agent, the *misrepresentation* of such a fact, so as to make the risk appear less than it actually is, and induce an underwriter to take a risk which he might otherwise decline, evidently deserves a penalty not less severe.

Represent-
tation,
what is.

A "representation," in the technical language of insurance, is something which is told to the underwriter by the assured or broker as an inducement to him to enter into the contract. If volunteered, it naturally is something tending to make the risk appear less than would otherwise be supposed. If given in answer to an inquiry, it is something tending to disarm a suspicion. One way or other, a representation is a statement of fact or opinion, on the faith of which the underwriter is induced to accept

(r) "Or the materiality of facts, as tending to show the true nature of the risk that he desires to be covered, the assured ought to be, may be, and usually is, a competent judge. Hence it is perfectly just to require their disclosure, and not to allow his ignorance or inadvertence as an excuse for the omission. But there is no process of reasoning that can enable the assured to judge of

the possible or probable influence on the mind of the underwriter of circumstances that in reality are extrinsic to the risk. Their effect will frequently depend on accident or caprice, and will certainly vary according to the different temperament, disposition or character of the individuals to whom he applies for the insurance." (2 Duer, Ins. 390.)

the risk. A representation, however, is verbal only, or at any rate is not written on the policy: otherwise, it changes its character, and becomes a warranty or condition of the contract.

§ 145.—From the earliest recorded times, and in other countries, particularly France, no less than amongst ourselves, it has been a principle, and perhaps a peculiarity, of the law of marine insurance, that a misrepresentation, made previously to entering into the contract, if material, or if made with intent to deceive, renders the contract wholly void. By “material” must be understood, not material in the event, but material at the time when it was made, as tending to induce the underwriter to accept a risk which he might otherwise have declined.

Effect of misrepresentation.

§ 146.—A warranty must be literally complied with; but as for a representation, it is enough, when it has been made in good faith, that it be complied with substantially, *i.e.*, so that the risk be not increased. Where an underwriter was told that the ship he was asked to insure “mounts twelve guns and twenty men,” and she did in fact carry less guns and men than were named, but the deficiency was more than made up by her having a number of carronades and boys, so that her fighting capacity was rather more than less than was represented, it was held that, although by the custom of trade carronades were not guns, nor boys men, yet that the representation having been substantially complied with, the policy must hold good (s).

Substantial compliance is enough.

§ 147.—It has been said that a misrepresentation fraudulently made with intent to deceive shall vitiate a policy, even though it be not material (t); a proposition which certainly approves itself to one’s sense of justice. It may be doubted, however, whether such a case ever arises in practice; for who would attempt to deceive by stating something not material to the risk? What is

Of misrepresentation fraudulent yet not material.

(s) *Parson v. Watson*, Cowp. 785.

(t) *Arn. Ins.*, p. 551 of 2nd edit.

intended is, perhaps, merely this, that if a fraudulent design can be proved, the materiality of the mis-statement need not be discussed.

Misrepresentation
by agent.

§ 148.—A misrepresentation by an agent vitiates a policy no less than if made by the principal (*u*). And it does so, notwithstanding that the eventual loss is something wholly unconnected with the fact misrepresented; as if a ship misrepresented to be neutral is lost in a storm (*v*).

When a
thing is
believed, or
expected.

§ 149.—If the assured, or his agent or broker, states merely that he *believes* so and so to be the fact, and it is not so, this is no misrepresentation if he honestly believes it; but it is so if it can be shown that from matters within his knowledge he could not really have believed it (*w*). Perhaps, indeed, one who thus asserts his belief ought to be required to show what grounds he had for so believing (*x*). The rules are the same if he merely says that so and so is *expected*.

3. *Deviation and Change of Voyage.*

Of conditions
defined in
the policy.

§ 150.—From these preliminary matters we must turn to the conditions actually set down on the face of the contract. Here a somewhat stricter observance of the conditions is necessary. For a "representation," as we have seen, it is enough that if it substantially though not literally correspond with the facts; a variation between them, when there is good faith, will not vitiate the policy if it does not increase the risk. But the written conditions of the policy must be literally and strictly complied with, otherwise the policy will be void, not on the ground that the risk was greater than, but merely that it was different from, that which the underwriter undertook.

(*u*) *Fitzherbert v. Mather*, 1 T. R. 12.

(*v*) 1 Marsh. Ins. 453.

(*w*) *Pawson v. Watson*, Cowp. 787.

(*x*) See 1 Marsh. Ins. p. 454, n. a.

The contract in fact is limited by, or made conditional upon, the terms laid down in the policy. If those terms be not adhered to, the bargain entered into is at an end; and it is too late, after a loss, to make a fresh one.

For example, if the policy is on linens, and the goods laden are cottons, the underwriter is not liable for a loss of these, though it may be that cottons were as good a risk as linens, and that the underwriter would have taken either at the same premium (*y*). If the goods are insured by the ship A., and they are shipped by the ship B., or at any part of the voyage are without necessity transferred to the B., the underwriter is off the risk, though it may be that the B. was as good or a better ship, and the underwriter, if asked, would readily have transferred his risk from one ship to the other. If the voyage is described as from A. to B., and the ship goes to C. instead of B., the policy is at an end, no matter though the voyage from A. to C. be less hazardous than that from A. to B.

But all this has reference only to changes not necessitated by the accidents of navigation. This is so, even with regard to the description of merchandize insured. Thus, where the goods insured were, owing to the wreck of the ship, necessarily sold at a foreign port, and, as the best means of remitting the proceeds to the owner, the proceeds were invested in the purchase of goods of a different kind, which were sent on to their destination, the original underwriter was held liable for the loss of this substituted cargo (*z*). And if, from any necessity arising from sea-peril, such as the disabling of the original ship, the goods are forwarded to their destination in another bottom, the original policy protects them on board the second ship (*a*). And in all cases of departure from the track laid down in the policy, the underwriter is never exempted from liability in case the departure from the

(*y*) *Hunter v. Prinsep*, Marsh.
Ins. 323.

(*z*) *Plantamour v. Staples*, 1 T.
R. 611.

(*a*) *Ibid.*

track is necessitated, or reasonably justified, by the accidents of navigation (b). Here, again, it is immaterial whether the accident is or is not one of the perils insured against in the particular policy. For instance, if a ship be insured against sea-peril only, and not against war-risks, a departure from the track in order to escape the pursuit of an enemy would not vitiate the policy (c).

§ 152.—Of those departures from the conditions of the contract which render a policy void, by far the most important, as the most frequent, is the departure from the prescribed track,—a departure which, when not thus justified by necessity, goes by the technical name of Deviation.

Deviation
and change
of voyage.

Deviation is to be distinguished from a Change of Voyage. This last takes place, when one or other of the termini, either the loading port or the port of final discharge when the insurance is on goods, is different from that named in the policy. So long as the termini remain the same, though the ship, instead of going direct to the port named in the policy, or instead, if there be several

(b) *Delany v. Stoddart*, 1 T. R. 22. Going out of the course to assist a vessel in distress is no deviation provided, and so far as, it is done to rescue life; it is otherwise if the motive is merely to save property, and so earn salvage. Hence, while it is no deviation to bear down upon a vessel in distress to ascertain whether life is in danger, yet it would be a deviation to take the vessel in tow to bring her into port, if the lives of her crew could be more easily saved, and at less risk to the salving ship, by taking the crew on board the latter. (*Scaramanga v. Stamp*, 4 C. P. D. 316; 5 C. P. D. 295.) Going into port to repair damages which have rendered the ship unseaworthy, is no deviation;

but it would be a deviation to remain there in order to effect repairs not necessary for the completion of the voyage. (*Motteux v. London Ass. Co.*, 1 Atkyns, 545.) The necessity for obtaining supplies necessary for the voyage is no excuse for putting into a port, if the supplies were such as ought to have been, but were not, put on board before sailing on her voyage. (*Woolf v. Claggett*, 3 Esp. 256.)

(c) *Scott v. Thompson*, 1 Bos. & Pul. N. R. 181. There is a case at nisi prius decided in the opposite way, but this is pronounced by Arnould to have been wrongly decided, which seems plainly reasonable. (*O'Reilly v. Roy. Exch. Co.*, 4 Camp. 246; see Arn. Ins. 461, 2nd edit.)

ports named, of visiting them in the order which the policy lays down, goes first to some other port, or varies the order, that is simply a deviation (*d*).

The reason for drawing this distinction is, that a deviation has not the same effect on the liability of the underwriter as a change of voyage. In the latter case, the policy ceases to have any validity immediately upon the forming of the resolution to make the change. Thus, a policy on a ship at and from Liverpool to New York will protect the ship whilst lying in the Liverpool docks intended to make a voyage to New York: but should her owner change his mind, and charter her or put her on the berth for New Orleans, or even definitely resolve to do so, the policy thereupon ceases to protect the ship, and if she were to take fire the next morning, before a single thing had been done by or to her that would not have been done had there been no change of plan, the loss could not be claimed from the underwriters (*e*). A deviation, on the other hand, only renders the policy void from the point at which the course is actually changed. A ship, insured from Liverpool to New York, may be cleared at the Liverpool custom-house with part of her cargo for Halifax and the remainder for New York, and until she reaches the dividing-point, or point at which she turns off from the track for New York direct, she is protected by her policy (*f*). When the deviation has been made, however, the policy is at an end once for all: it does not revive when the ship returns to her direct track, so as to protect her against a subsequent loss (*g*).

§ 153.—That the voyage shall be treated as the same so long as the termini are the same is a convenient practical rule, serviceable in the great majority of cases. There are, however, occasions to which this rule is not

(*d*) *Woolridge v. Boydell*, Doug.
16.

(*e*) *Ibid.*

(*f*) *Hare v. Travis*, 7 B. & Cr.
14.

(*g*) *Elliott v. Wilson*, Park, Ins
623.

applicable, and we must then fall back on some broader principle. Suppose, for instance, that a ship, laden with a cargo of cotton, is insured from New Orleans to Liverpool; and that after she is fully laden the cargo takes fire, and the fire is put out by filling the hold with water, the effect of which is that the whole cargo is rendered unmerchantable, and is, therefore, sold at New Orleans. Suppose, further, that the captain takes in a second cargo, likewise for Liverpool, with which he sails on his voyage. Is this the same voyage as that originally insured, and is the ship covered by the original policy?

In order to answer this question, we must examine the principle. The reason why the voyage is usually held to be the same when the termini are the same, evidently must be that the identity of a voyage depends on the principal or main purpose of it, and not on the accessory circumstances. With merchant-ships, the principal purpose of a voyage is, ordinarily, the carrying of a particular cargo to a particular place; whence it may properly be held that identity of cargo and identity of destination are of the essence of identity of voyage (*h*).

If, then, the master, when his original contract of affreightment is put an end to, is absolutely free to take a new cargo for any place as may be offered, it would seem that this must be a new voyage, though the port of destination may happen to be the same. In the case of a vessel belonging to a line of packets, bound to go to a particular port and on a stated day full or empty, it would

(*h*) This is pointed out by Emerigon, who cites a passage from Casaregis, to the effect that a change of voyage takes place when the first, principal, destination is not pursued by the master, as for instance when the ship is no longer intended to go, nor does go, with her original cargo to the place designed; whereas on the other hand the voyage is the same, when

the captain, always retaining his first purpose and destination, does not altogether follow it in the accessories, changing the track from direct to indirect, or calling at other places on the way, yet still with the constant intention of eventually reaching the place of original destination (2 Emer. Ass. c. xiii., § 14, pp. 92—93).

be otherwise. Here the taking of this particular cargo was a mere incident of the voyage, not its determining cause, and if this cargo is withdrawn and another substituted, and still the ship sails in her due turn, the voyage must, it is conceived, still remain the same.

§ 154.—To come now to Deviation :—In the preceding chapter, when setting forth the proper manner of describing the voyage in the policy, the principal instances or species of deviation have already been pointed out. These are, going to a port not named in the policy, not clearly justified by any custom, nor falling within the range of any more general terms; visiting ports, where several are named, in an order different from that which the policy has defined; where the insurance is to a district comprising several ports, taking them in an order other than customary, or, if there be no custom, other than their natural order; staying to trade, where the language of the policy implies no such liberty; or calling at places, though within some general liberty given, for purposes which are not within the scope of the voyage. To these may be added improper delay in not prosecuting the voyage with reasonable despatch (i).

Examples
of deviation.

§ 155.—When a deviation has been made in any of these ways, unless the departure from the prescribed track can be justified on the ground of unforeseen neces-

Effect of
deviation.

(i) No delay, however unusual, is to be regarded as improper, if it be necessitated in order to carry out the purposes of the voyage. There can be no doubt, for example, that an insurance on a ship at and from a port would cover the ship during a delay at the port of loading, however long and unusual, if properly undergone in waiting for a remunerative freight for the voyage insured. (*Phillips v. Irving*, 7 Man. & Gr. 325.) But it is an implied condition in every voyage policy,

that the voyage shall be conducted with reasonable despatch; so that a delay not justified by the necessities of the voyage has the same effect as a deviation. (*Hartley v. Buggin*, 3 Doug. 39; *Mount v. Larkins*, 8 Bing. 108.) The latter case establishes that an unreasonable delay in the outward voyage may have the effect of vitiating a policy on the homeward voyage, which by such delay is thrown into a season different from that which the underwriter was entitled to expect.

sity, the policy comes to an end for all purposes the moment the deviation has been actually committed. The deviation may not really have increased the risk (*j*); no loss may have occurred until the ship is again in the same track, possibly at the same time, as if she had not deviated (*k*); the deviation may not be in any respect the fault or act of the assured or his agent: all these circumstances are immaterial; the conditions of the contract have been broken, and the contract is at an end.

Liability of
shipowner.

§ 156.—Suppose the insurance is on goods, and the deviation has been the fault of the shipowner, the owner of the goods, being thus deprived of his remedy against the underwriter, has a right of action against the shipowner for this consequence of his breach of contract. The shipowner cannot shield himself from liability under the plea that the deviation was not the direct cause of the loss of the goods. He has undertaken to deliver the goods at their destination in the like good order as when shipped, and his exemption from liability for their loss is limited to the accidents of navigation occurring in the voyage defined by the bill of lading or charter-party. If he unlawfully digresses from the stipulated track, he must himself be answerable to the shipper or charterer for the perils to which he exposes the goods in a new course of navigation (*l*). All that a merchant has to do, then, in order to be safe, is to take care that the voyage as described in the policy is precisely the same as that marked out in the contract of affreightment.

4. *Breach of Warranty.*

§ 157.—The same strictness of observance which is required for those conditions of the contract which define

(*j*) *Hartley v. Buggin*, 3 Doug. 39.

(*l*) *Davis v. Garrett*, 6 Bing. 716; *Scaramanga v. Stamp*, 4 C. P. D.

(*k*) *Elliott v. Wilson*, 7 Br. P. C. 470.

316; 5 C. P. D. 295.

the subject-matter insured, the ship, and the voyage, is requisite with regard to those adventitious conditions, so to speak, which are introduced by *warranties*. Every warranty must be, not like a representation substantially, but literally and exactly complied with, under the like penalty of vitiating the policy.

§ 158.—A warranty is a condition written on the face of the policy, whether in the body or in the margin, whether in a line with the other writing or transversely. A representation may be made into a warranty by simply writing it into the policy, and its character is then changed. The word “warranted” is not necessary: often a mere word of description has the force of a warranty, *e.g.*, “the British ship *Anne*” amounts to a warranty that the *Anne* is British. But a memorandum pinned or wafered to a policy, or folded inside it, though shown to the insurers while signing, is no more than a representation (*m*). What makes a warranty.

§ 159.—The strictness with which a warranty is enforced can hardly be exaggerated. There are two principles: the warranty must be literally complied with, and if the letter be complied with, nothing more, in the way of reasonable inference or supplement, is required. Thus, a policy on a ship for a voyage home from Africa, warranted “to have sailed from Liverpool with fifty hands,” was held void for breach of warranty because she had sailed from Liverpool with only forty-six, though six more had been taken in off Beaumaris, and though she was as safe between Liverpool and Beaumaris with forty-six as with fifty, and it would not have mattered to the underwriters on the *homeward* voyage if she had been less safe, or had been lost, during that period (*n*). On the other side, where a ship was warranted to carry twenty guns, and she had twenty guns, it was decided that the warranty was satisfied, though she had not a crew sufficient to work them (*o*). These two decisions are paradoxical; and it Warranty must be literally complied with.

(*m*) Arn. Ins. 510.

343.

(*n*) *De Hahn v. Hartley*, 1 T. R.

(*o*) *Hyde v. Bruce*, 3 Doug. 213.

may be doubtful, at any rate with regard to the second of them, whether the courts would uphold them at the present day; but they serve to illustrate the principle.

From what point policy is cancelled by breach of warranty.

§ 160.—A breach of warranty only cancels the policy from the point of time to which the warranty refers. Thus, where a ship was insured from New York to Quebec and thence to England, with a warranty to sail from Quebec on or before the 1st November, and the vessel, through some accident, sailed from New York so late that she could not possibly reach Quebec by that date, and was lost on her way thither after the 1st November, the underwriters were held liable (*p*).

Warranty safe on day named.

§ 161.—A warranty that the ship is safe, or in port, on a day named, is satisfied if that is true on any part of the day; if she is lost, or has sailed, at a later period of the same day, the underwriters are liable (*q*).

Warranties to sail.

§ 162.—A warranty in very common use is that the ship shall sail before—or after—a day named. Such a warranty does not imply that the ship must have actually quitted the port or district by the time specified; it is enough if she have “broken ground,” or set out on her voyage with everything in readiness for it, and able to quit the port, if not prevented by some accidental cause: if she has done this, so far for instance as to have come out of dock into the river, and is then prevented from quitting the port by stress of weather or any similar impediment, the warranty is satisfied. But the impediment must not be in herself: if, therefore, some of the crew, or stores, or a clearance at the customhouse, be wanting, and though she has broken ground it will be necessary to stop for these, she has not sailed within the terms of the warranty, and the policy is consequently void (*s*).

(*p*) *Baines v. Holland*, 10 Exch. 803.

(*q*) *Blackhurst v. Cockell*, 3 T. R. 360.

(*s*) *Bond v. Nutt*, Cowp. 607; *Graham v. Barras*, 5 B. & Ad. 1011.

If she quits the port without sufficient ballast for the voyage, intending to take in the remainder outside the bar, that is no “sailing” in this sense, and if the ballast is

§ 163.—On the other hand, a warranty “to depart ^{Warranty} from,” or “to sail from A.” by a given day is not satisfied ^{to sail} unless by that day the ship has actually left the precincts ^{from.} of the port named (t).

Either warranty is absolute: that is to say, it is no excuse that the ship was ready, and only prevented from leaving by a storm or other accident (u).

5. *Implied Warranties: Unseaworthiness.*

§ 164.—We come now to “implied warranties,” or conditions of the contract not set down in writing, but tacitly understood as essential, being grounded in the nature of the transaction between the parties. A breach of one of these tacit conditions is no less fatal to the contract, and is fatal to it precisely in the same way, as the breach of an express warranty; it does not merely exempt the underwriter from losses connected in the way of consequence with the breach, it renders the policy wholly void.

§ 165.—The principle on which the law annexes tacit conditions of this kind to a contract, thus in a sense doing ^{Why a} that which our judges have repeatedly declared them- ^{warranty is} selves incompetent to do,—*making* a contract between ^{implied.} the parties, is, that where the words used show that there must have been present to the minds of the contracting parties some term or condition *behind* the words, without which the contract would be unintelligible or irrational, a court of law is only carrying out the intention of the parties in supplying that which the very incompleteness of the language used indicates as its necessary complement (v).

taken in after the date specified, the warranty has been broken. (*Pettigrew v. Pringle*, 3 B. & Ad. 514.)

(t) *Moir v. Roy. Exch. Ass. Co.*, 4 Camp. 84; *Lang v. Anderton*, 3 B. & Cr. 495.

(u) *Nelson v. Salvador*, Mood. & Malk. 309.

(v) A warranty or condition may be implied, “whenever there is something not expressed, which it is clear to all men of ordinary intelligence and knowledge of business

What is
seaworthi-
ness.

§ 166.—It is, for example, an implied warranty in every insurance for a voyage, that the ship shall at the outset of it, and more particularly when she puts to sea, be *seaworthy*, or reasonably fit in every respect to encounter the ordinary difficulties of that voyage.

§ 167.—To render a ship seaworthy, it is not enough that she can by possibility perform her voyage, supposing the weather shall be exceptionally fine: she must be fit to encounter *ordinary* rough weather (*w*). Nor is it enough that she can perform it sooner or later; she must be fit to perform it with reasonable despatch, since delay increases the danger: whence a ship was held unseaworthy because her topgallant and other light sails, needed to enable her to keep up with her convoy, were rotten when she sailed, and unfit for use (*x*). She must also have proper stores and medicines (*y*). Nor is it enough that her hull is sound and her tackling in good condition: there must likewise be a crew sufficient in number, and a master and officers competent for their duties (*z*). A ship was pronounced unseaworthy because her first mate was a landsman ignorant of navigation, so that there was no one on board qualified to take the place of the master in case of

must have been either latently or palpably present to the minds of both parties to the contract when it was made; for otherwise their contract would be as a business transaction insensible or contrary to the universal course." (*Per* Brett, J., in *Daniels v. Harris*, L. R. 10 C. P. at 8.)

(*w*) *Daniels v. Harris*, L. R. 10 C. P. 1, at 4.

(*x*) *Knill v. Hooper*, 2 H. & N. 277.

(*y*) *Woolf v. Claggett*, 3 Esp. 257.

(*z*) *Forshaw v. Chabut*, 3 Br. & B. 158. With regard to a pilot, a ship would be unseaworthy if she set sail without a pilot, where the taking of

a pilot is customary or compulsory by law; but not so, if at any later stage of the voyage the master, whether prudently or not, omits to take one. There is indeed one decision (*Law v. Hollingsworth*, 7 T. R. 160) opposed to this latter position, so far as relates to an improper omission to take a pilot compulsory by Act of Parliament; but this is now generally considered to be doubtful law, as being opposed to the principle that the warranty of seaworthiness applies only to the outset of the voyage. It is at all events certain that a justifiable omission to wait for a pilot in entering a port does not vitiate the policy.

need (a). And it would seem that the officers must be certificated according to the requirements of the Merchant Shipping Acts. And the ship must not be overloaded (b).

§ 168.—Seaworthiness is not a fixed inflexible quantity; Is a relative term. the degree required has a relation to the length and hazardousness of the voyage, and the kind of cargo. A higher degree of it would be required for a voyage round Cape Horn than for one from London to Liverpool. If the voyage consists of several stages, some of which require a greater degree of seaworthiness than others, the owner generally speaking has the option of either making the ship seaworthy at the outset for the whole course, or, at the commencement of each stage, for that stage only (c). Thus in the case of a whaler, the warranty, it has been said, has four gradations: the ship must be “fit for dock in London, fit for river to Gravesend, fit for sea to Shetland, then fit for whaling” (d). When the policy is “at and from” a port, no more is required of the ship while she lies in harbour than that she be fit to lie there safe, nor when she begins to load than that she be fit to hold her cargo without damaging it (e); but when she sails she must be fit for sea, otherwise the policy at that point ceases to protect her. But with regard to any later stage than her first sailing, it is conceived that if the ship was then seaworthy for the entire voyage, the warranty is completely satisfied. To take the case of the whaler: if when she sails from Gravesend she is fit for whaling, it is conceived that there is no absolute warranty that she shall be so when she sails from Shetland, though there would be, were the equipment for whaling postponed to her arrival there. In other words, the rule as to different

(a) *Clifford v. Hunter*, 3 C. & P. 16; it is to be noted that this was a voyage from Mauritius to England, and the length of the voyage formed an element in the judgment.

(b) *Daniels v. Harris*, L. R. 10 C. P. 1.

(c) *Dixon v. Sadler*, 5 Mees. & Wels. 414.

(d) *Thompson v. Hopper*, 6 E. & B. 177, at 181.

(e) *Parmeter v. Cousins*, 2 Camp. 235.

degrees of seaworthiness for successive stages of a voyage confers a privilege, not imposes an obligation (*f*).

Warranty
applies
only to
time of
putting to
sea.

§ 169.—When the ship has once put to sea, seaworthy for the voyage insured, the implied warranty has been completely satisfied (*g*). There is no warranty that the ship shall continue seaworthy, nor even that the master shall do his best to keep her so, or to restore her to that condition, in case he shall have the opportunity. If the policy is for a voyage out and home, there is no warranty of seaworthiness for the voyage home (*h*). If the ship, having been rendered unseaworthy by some accident, puts into a port where she might be repaired, there is no warranty that the master shall make her seaworthy before he sails thence (*i*).

Warranty
applies to
policies
on cargo.

§ 170.—The warranty that the ship is seaworthy applies to every insurance for a voyage, even to insurances on cargo (*j*), notwithstanding that the owner of the cargo can have no power to make the ship seaworthy. The warranty is absolute; so that it is not enough to show that the owner of the ship has done all that was reasonably in his power to ensure her seaworthiness; a latent defect, though it be such as no ordinary vigilance could have

(*f*) The privilege itself may be subject to restrictions based on the customary mode of conducting navigation. For example, in the case put, as to whaling voyages, it may well be doubted whether the ship would be justified in stopping at Gravesend in order that she might be rendered fit for sea, it being usual to make such a ship fit for sea before leaving the dock in London. All that is meant by the rule, in such a case, is, that supposing, for example, two anchors were enough for the river voyage, but three were needed for sea, the third anchor might be supplied at Gravesend without any breach of the warranty of seaworthiness. (See

Weir v. Aberdeen, 2 B. & Ald. 320.)

(*g*) *Annan v. Woodman*, 3 Taunt. 299.

(*h*) *Shore v. Bentall*, 7 B. & Cr. at 798.

(*i*) *Schloss v. Heriot*, Weekly Reporter, 1864-5, p. 596.

(*j*) *Daniels v. Harris*, L. R. 10 C. P. 1, at p. 5. There is, however, no such thing as an implied warranty that the cargo itself is seaworthy, or shipped in a condition fit for being carried, *e.g.*, without danger of spontaneous combustion (*Koebel v. Saunders*, 17 C. B. N. S. 71); nor that the lighters in which the cargo is discharged are seaworthy. (*Lane v. Nixon*, L. R. 1 C. P. 412.

detected, is fatal to the policy (*k*). And, as has already been said, a breach of this implied condition makes the policy wholly void, so that it is immaterial whether the loss claimed was in any way connected with the unseaworthiness, or totally independent of it.

§ 171.—There is a distinction, which must carefully be attended to, between the liability of a shipowner towards the owner of cargo, under his contract of affreightment, and the rights of an underwriter as against his assured, in this matter of seaworthiness. The former is more extensive than the latter, so that there are cases in which the owner of cargo has a double remedy, and may claim either upon the shipowner or upon his own underwriter. Under the contract of affreightment, the shipowner engages with the owner or shipper of the goods he undertakes to carry (*l*), not merely that the ship shall be seaworthy and her crew competent at the outset of the adventure, but likewise that he or his servants will use all reasonable diligence to keep her so during its continuance, and that the master and crew shall do their duty during the entire term. The ship may set out in a seaworthy state, but if she be damaged in a storm, and afterwards put into port, the shipowner would no doubt be liable to the owner of cargo for any loss occasioned by the ship's being improperly allowed to quit that port in an unseaworthy condition. And if any damage to cargo were occasioned by improper navigation on the part of the master or crew, as by negligently running the ship aground, or faultily coming into collision with another ship, the owner of the cargo might recover damages from the shipowner. But in any of these cases the owner of cargo may elect to proceed against his own underwriter, who would have no defence. The underwriter, however, having paid the loss, becomes entitled to take the place of the assured, and sue the shipowner in his name.

(*k*) *Lee v. Beach*, Park, Ins. 468, 8th edit.

(*l*) That is, of course, unless there

be some special clause in the bill of lading, exempting the shipowner from such liability.

Shipowner's liability for unseaworthiness under the bill of lading.

Ship-owner's warranty of unseaworthiness as towards owner of cargo.

§ 172.—It is now settled that under the contract of affreightment, in addition to the liability of the shipowner, above spoken of, to use reasonable diligence on the part of himself and his servants for the safety of the cargo during the entire continuance of the voyage, there is likewise an absolute warranty on his part of the ship's seaworthiness at the time of sailing on the voyage with the cargo. The point of time to which this warranty is attached is made coincident with the point at which such a warranty attaches in the cargo-policy. Hence, if a ship is chartered to go in ballast from A. to B., and there load a cargo for C., it is not enough that she is seaworthy on sailing from A., or at the time of beginning to load her cargo at B.; the absolute warranty is, that she shall be seaworthy when she sails with her cargo from B. The reason given in the judgments is, that the owner of cargo must not be placed in the position of losing the protection of his policy by reason of the ship's unseaworthiness, and yet have no remedy against the shipowner. One way or other, it was laid down, the owner of cargo ought always to be safe (*n*).

From these decisions it may reasonably be inferred that if a ship is not seaworthy at this point, and is subsequently lost from some cause unconnected with the unseaworthiness, the shipowner, whose breach of warranty has deprived the owner of the cargo of the protection of insurance, must himself stand in the underwriter's place, and bear the loss.

Proof of unseaworthiness.

§ 173.—Every ship is to be presumed seaworthy until

(*n*) *Steel v. State Line S. S. Co.*, 3 Ap. Ca. 72; *Cohn v. Davidson*, 2 Q. B. D. 455, at 461. And see *Gibson v. Small*, 4 H. L. C. at 421. It is to be borne in mind, however, that the shipowner's liability in such a case, where the loss has not arisen from his personal fault, is limited by Act of Parliament to the amount of 8*l.* per

register ton; so that an owner of cargo who wishes to be perfectly safe in this matter might do well to insert in his policy some such clause as "No claim under this policy to be disputed on the ground of unseaworthiness; the insurers reserving, however, all rights against the shipowner."

the contrary be proved: the burden of proof is on the underwriter. If a ship springs a leak and founders shortly after sailing, with no gale or other visible cause, it is natural to suspect her unseaworthy. Formerly it was held that such a circumstance justified the Court in pronouncing her so, without leaving the matter to the jury, in the absence of further information. It is now settled, however, that such an unexplained leakage, though an *indication* of unseaworthiness, which ought to have much weight with a jury, is only one indication amongst several, and it will be for the jury to say whether, taking account of the ship's behaviour on previous voyages, of the length of time that may have elapsed since the ship was last surveyed in a dry dock, and other circumstances, they consider it reasonably probable that the leakage arose from unseaworthiness, or from some "extraordinary though invisible and unascertained peril of the seas" (o).

§ 174.—There is no warranty of seaworthiness in any time-policy. This rule was originally based on the reason that a time-policy may often have its beginning when the ship is in the middle of a voyage, when it would be impossible for her owner to know whether she was seaworthy or not; but the rule is a general one, and applies even though the ship be in her home port, or on the very point of sailing when the time-policy takes her up (p).

No warranty of seaworthiness of a time-policy.

It is not to be inferred from this that an underwriter would be liable in case a ship, insured by a time-policy, were lost by reason of her unseaworthiness merely, without the intervention of a peril insured against. This point, however, will be dealt with in the next chapter, to which it properly belongs.

(o) *Anderson v. Morice*, L. R. 10 C. P. 58, 610; *Pickup v. Thames & Mersey Mar. Ins. Co.*, 3 Q. B. D. 594.

(p) *Thompson v. Hopper*, 6 E. & B. 172, 937; *Dudgeon v. Pembroke*, 2 Ap. Ca. 284, at 293.

6. *Illegal Traffic.*

Illegal
traffic in
general.

§ 175.—Finally, an insurance is void if it is intended to cover a voyage or traffic forbidden by law ; always provided the assured is privy or in any sense a party to the illegality. Thus if cargo is carried on a ship's deck in winter contrary to statute, a policy would be void if the assured knew of or were a party to the illegal shipment, but not otherwise (*q*). And an illegal act of the master, in carrying passengers without the certificate which the Passenger Acts enjoin, would vitiate the policy on the ship if, but only if, the shipowner were privy to his so doing (*r*). "Where a contract is to do a thing which cannot be performed without a breach of the law, it is void, whether the parties know the law or not. But in order to avoid a contract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner, it is necessary to show that there was the wicked intention to break the law" (*s*).

Smuggling,

§ 176.—Concerning smuggling, our law draws a distinction, the propriety of which has been much questioned. To smuggle, contrary to the English revenue laws, is illegal, and vitiates a policy ; but to smuggle in violation of the revenue-laws of other countries does not do so ; the maxim having long ago been laid down, and still being acted on, that the English law pays no regard to the revenue-laws of other countries (*t*).

Blockade
and con-
traband of
war.

§ 177.—With a somewhat similar laxity of international morality, our law permits British subjects, when this country is neutral in time of war betwixt other countries, to run a blockade, or to carry contraband of war for the benefit of either belligerent, without treating

(*q*) *Cunard v. Hyde*, 2 E. & E. 1 ; *Wilson v. Rankin*, L. R. 1 Q. B. 162.

(*r*) *Dudgeon v. Pembroke*, L. R. 9 Q. B. 581, at 585.

(*s*) *Waugh v. Morris*, L. R. 8 Q. B. 202, at 208.

(*t*) *Lever v. Fletcher*, 1 Marsh.

Ins. 61, 2nd edit.

the insurance of such traffic as illegal ; although of course, as such traffic exposes the ship to the risk of seizure, it is necessary to acquaint the underwriter with the nature of the voyage, otherwise the policy would be void on the ground of concealment (*u*).

§ 178.—When this country is at war, the rule for its subjects is more severe. To traffic with the enemy (*v*), or to insure foreign property against British capture (*w*), are illegal acts, and no insurance can avail to protect them.

(*u*) *Ex parte Chavasse, in re Grazebrook*, 34 L. J. (Bkpey.) 17.
In the United States, on the other hand, at all events so far as running a blockade is concerned, such in-

surances are illegal. (1 Duer, 690.)
(*v*) *Potts v. Bell*, 8 T. R. 548.
(*w*) *Hagedorn v. Bazett*, 2 M. & S. 100.

CHAPTER IV.

THE PERILS INSURED AGAINST.

Principles.

§ 179.—The law of insurance naturally consists of two principal parts, the subject of the first being the effecting of insurance, and that of the second the recovery of losses. To the first belong such questions as, what to insure, how much, in what manner, with what precautions, and under what conditions. This we have now gone through. The second Part has to do with that indemnity against loss, to provide which is the very purpose of insurance; and this may conveniently be divided under two heads, first as to its quality and then its quantity,—in other words, first what species of losses the assured is to be indemnified against, and secondly on what principles the amount of his indemnity is to be regulated.

§ 180.—The first thing to be done, then, is to define what those causes of loss, or perils, are which the insurer takes upon himself, as distinguished from those, if any, which remain with the assured. This is to be gathered from the words of the contract, taken in connection with its known scope and purpose, and applying such principles of English law as bear on the matter. Before turning to the words, it may be well to consider that general scope and purpose to which the words must be subordinated.

Principles. § 181.—The purpose of insurance, as has been pointed out in the Introduction, is, to enable a merchant or a ship-owner to carry on his ventures undisturbed by that element

of uncertainty which is brought in by the dangers of navigation. A second element of uncertainty, that arising from the fluctuation of markets, the merchant or shipowner retains for himself.

The combination of these two uncertainties is affected by a third, namely, that ordinary variation in the length of a voyage which may arise either from accident or without accident, as, from one vessel being a quicker sailer than another, meeting with better winds or fewer calms, or being better or more fortunately navigated. A delay arising from such causes may occasion loss or gain, as a market chances to go down or up. If there be a gain, this must not belong to the underwriter; the underwriter, therefore, cannot be asked to pay for the loss; the chances of a longer or shorter voyage, as affecting the market, must remain with the assured.

§ 182.—Again, it is of the essence of insurance that it shall be, on the side of the underwriter, a fair wager; that is to say, that the underwriter shall have a chance of winning to counterbalance his risk of loss. It follows that the losses he is to pay for must be such as *may*, not such as *must*, happen. This excludes ordinary wear and tear or damage necessarily suffered in driving the ship through the water by sail or steam; and this, notwithstanding that the degree of it may vary with the variations of ordinary bad weather, contrary winds, and other incidents common to all voyages. It likewise excludes loss arising from natural wastage, corruption through length of time, heating from the confined atmosphere of the hold, and other causes inevitable under the given conditions. These are matters which a merchant can more or less estimate beforehand, and which must be taken account of, with the market price, in determining his ventures. For the same reason, an underwriter must in no case be liable for losses caused by the fault of the assured himself, since such a liability would destroy the fairness of the wager.

§ 183.—An underwriter is to pay, then for losses arising

from violence or accident. Here two questions arise : is he to pay for *all* violence or accident, or only for such as is peculiar to sea-transit : and, is he to be exempt from those losses for which the assured has a remedy against some third party, as for example against the shipowner as carrier ? In order to answer these questions, we must look to the words of the policy.

Clause in
policy.

§ 184.—The clause in the ordinary policy is as follows : —
“Touching the adventures and perils which we the assurers are contented to bear and do take upon us in this voyage, they are *of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter-mart, surprizals, takings at sea ; arrests, restraints and detrainments of all kings, princes, and people, of what nation, condition or quality soever ; barratry of the master and mariners ; and all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment, or damage of the said goods and merchandizes and ship, &c., or any part thereof*” (a).

§ 185.—This clause evidently is neither a definition based on a principle, nor a complete enumeration of particular instances. Those who framed it have succeeded in conveying, along with the general impression of their meaning, the dimness with which that meaning was present to their own minds. A few prominent or perhaps representative instances are given, and then general words, “all other perils, &c.,” are added, to denote that these are only samples of a larger class. Hence, our courts have naturally concluded, and laid it down as a

(a) This clause is of great and unknown antiquity. It is probably of Lombard origin, and deserves comparison with a Florentine formula given in an Ordinance of the year 1523 :—“The said insurers running always the risk upon the said merchandize of every hazard of the sea, fire, jettison, reprisals,

robbery by friend or foe, and every other hazard, peril, fortune, disaster, hindrance, or mishap, though such as could not be imagined or thought of as happening or having happened to the said goods insured ; also barratry by the captain, except as to stowage or to the custom-house.” (4 Pard. 606.)

maxim, that these "all other perils, &c.," only mean such perils as are "of a like nature," to those specified. The examples meant to illustrate may thus serve to narrow the definition; and this indefinitely; for the unspecified perils, though like, are not the same as, those specified, so that there is some likeness and some unlikeness, and nothing to determine how much. That common property which entitles a peril to a place on the list is nowhere defined, except in some respects negatively. Negatively, it may be noted, this list at once furnishes an answer to the two questions raised in § 183. A peril, to be insured against, need not be peculiar to sea-transit; for fire is named, and goods may take fire on land as well as at sea. Nor is an underwriter necessarily exempt from those losses for which the assured has a remedy against a third party, for jettison is named, and jettison is usually replaced by a general contribution. But beyond negative inferences of this kind, the definition in the policy does not go.

§ 186.—Another English law maxim of common use for interpreting this clause in the policy is the well-known "*causa proxima non remota spectatur*:" the law refuses to look behind the proximate cause of loss. This is a rule based on good sense, but likewise requiring good sense in the application, or it may run into pedantry. It is not always easy to tell which is the proximate cause; partly because that which follows another thing by necessary connexions or in the ordinary course cannot be treated as an independent cause, and partly—unless this be merely another phase of the same difficulty—because we have to distinguish between the standing and fixed conditions of the subject-matter, and what may be called accidents. Whatever lies prepared, and as it were dormant in the nature of a thing until called into activity by some accidental circumstance, appears to be in point of time later than the accident, though it really is already there before it. Suppose fruit or meat is shipped for a voyage usually lasting a week, and is fit to keep sweet for so

long and not much longer, but by an accident the voyage is protracted for a month, the proximate cause of the putrefaction is in reality the accident,—for there has occurred nothing later except what inevitably resulted from causes which existed antecedently (b).

The practical bearing of all this will be better understood, if we go through the several perils enumerated one by one. They may be grouped under, perils of the seas, fire, perils of war, pirates and thieves, jettison, arrests and restraints, barratry, and “all other perils.”

Perils of the Seas.

§ 187.—“The term ‘perils of the seas,’” says Lush, J., “denotes all marine casualties resulting from the *violent* action of the elements, as distinguished from their natural, silent influence upon the fabric of the vessel,—casualties which may, and not consequences which must, occur” (c).

For “violent,” we should perhaps substitute some such word as unusual or accidental; for a calm or a fog may be as dangerous as a storm. Even thus amended, the definition is, perhaps inevitably, somewhat vague.

(b) It is not to be inferred from this that the underwriter in the case supposed would be liable for such loss by putrefaction; but merely that his non-liability must rest upon some other ground than the remoteness of the cause. He is not liable, as has been decided in *Taylor v. Dunbar*, 38 L. J. (N. S.) 178; and the reason there assigned is, that the goods were not damaged by sea peril; that, in fact, neither remotely nor proximately was there a loss by a peril insured against. The law as to the effect of delay is perhaps not yet perfectly clear. It has been said that an insurer of live

stock, though not liable for natural death, would be liable for death by starvation, resulting from an extraordinary delay by sea peril, which exhausted the supply of fodder. (*Lawrence v. Aberdeen*, 5 B. & Ald. 107, at 111.) And, if the ship be damaged, an underwriter on chartered freight is liable for loss arising from the charterer's throwing up the contract, by reason of the delay. (*Jackson v. Union Mar. Ins. Co.*, L. R. 8 C. P. 572; 10 C. P. 125.)

(c) *Merchants Trading Co. v. Universal Mar. Ins. Co.*, as given in L. R. 9 Q. B. 596.

§ 188.—If a ship has not been heard of for so long a time after sailing that there remains no reasonable hope of her safety, she is presumed to have foundered at sea, and the insurers are liable for the loss (*d*). There is in this country no fixed rule as to when that presumption arises; but, after an interval of time supposed sufficient to cover all reasonable chances of arrival, the ship is posted at Lloyds as missing, and then all underwriters are expected to pay. Foundering at sea.

§ 189.—Grounding, whether arising from stress of Grounding. weather, ignorance of the locality, blunder or stupidity, the desire to avoid some approaching vessel or other danger, in short, for any reason out of the ordinary course of things in the voyage, is considered one of the perils of the seas. But when a ship is in the ordinary course put on the ground in a place where she is intended to lie, as, to load cargo alongside a quay, or to dredge up a tidal river, and sustains damage merely from not being fit to take the ground, this is not a peril for which underwriters are liable (*e*).

§ 190.—Collision also is a peril; and this, whether it be Collision. the result of inevitable accident, or of fault on the part of the ship insured (*f*), or of fault on the part of the other ship (*g*). On the principle of *causa proxima*, the underwriter must pay, be the fault whose it may. What he pays, is the damage to the thing he has insured: as for the liability of the owner of the ship in fault to pay for the damage suffered by the other, that is a matter with which his underwriter has, under the body of his policy, nothing at all to do. It is usual, however, to provide for this liability by a distinct contract, called the collision clause, inserted in most if not all policies on ships (see §§ 348, 349).

§ 191.—Another head of sea-peril is damage suffered Stress of weather.

(*d*) *Green v. Brown*, 2 Stra. 1199.

(*e*) *Magnus v. Buttemer*, 11 C. B. 876.

(*f*) See *per* Willes, J. in *David-*

son v. Burnand, L. R. 4 C. P. 117 at 121; citing *Dixon v. Sadler*, 5 M. & W. 405.

(*g*) *Smith v. Scott*, 4 Taunt. 125.

through stress of weather ; as by blows of the sea which carry away bulwarks, boats, deck-houses, and the like ; by losing masts and yards in a gale, springing of a leak through violent straining, shifting of the cargo, or becoming waterlogged. The only difficulty in such cases consists in distinguishing between sea-peril and wear and tear ; a subject which is reserved for the section of Particular Average on ship.

The Perils of War.

§ 192.—The perils of war as affecting merchant ships and their cargoes are, in the case of belligerents, capture and all damage done in the attempt to capture, and this whether the capture be lawful or not, salvage paid for recapture, the being fired into by a friendly ship in mistake (*h*), and the like ; in the case of neutrals, arrest for contraband of war, and the various risks involved in an attempt to run a blockade. It is enough here to say that all these are perils insured against.

Fire.

§ 193.—Fire is covered by the policy, whether it be caused by lightning, carelessness, the explosion of gunpowder or acids, or any cause except the *vice propre* of the thing insured. If goods are shipped in a damp state, or otherwise so as to be unfit for carriage, and thereby without any external accident,—such as unusual heat of the hold arising from a leak,—burst into a flame, the underwriter on these particular goods is exempt, though if the fire spread to other goods or to the ship, the insurers of the latter would of course be liable.

It has been already pointed out (§ 105) that the risk of fire is covered during the whole of the transit, on shore as well as on shipboard, provided the transit is for one entire

(*h*) *Cullen v. Butler*, 5 M. & S. 461.

or unbroken voyage, as, with insurances on goods, it almost always is.

Pirates, Rovers, and Thieves.

§ 194.—By “thieves” in this clause is to be understood thieves with violence or thieves outside the ship’s company. Mere pilfering by the crew is not a risk insured against: the shipowner alone is responsible for it (i).

Jettisons.

§ 195.—Jettison is the intentional throwing overboard of cargo or of the ship’s tackling or effects, as, to lighten the ship in a storm or when leaking. For such losses the underwriter of the goods jettisoned is in the first instance directly liable (j): the loss, though by the hands of man, being necessitated or justified by the accidents of navigation. When goods or effects are jettisoned for the common safety, all who have derived benefit, that is to say the owners of the ship and the entire cargo, are bound to join in replacing the loss by the contribution called general average. This is a matter independent of insurance. The underwriter of the article thus sacrificed, having paid his assured the loss, is entitled to stand in his place, and receive his share of the indemnity furnished by the general contribution.

A jettison may be induced by motives other than the common safety; as for instance where, the ship being in imminent danger of capture, the master dropped a bag of specie into the sea, lest it should fall into the hands of the enemy; for which the underwriter was held liable under the head of jettison (k).

(i) See *Taylor v. The Liverpool* C. P. 639.

& *Great Western S. Co.*, L. R. 9 Q. B. 546.

(k) *Butler v. Wildman*, 2 B. & Ald. 398.

(j) *Dickenson v. Jardine*, L. R. 3

Arrests, Restraints, &c.

§ 196.—Concerning this peril, one thing alone needs here to be mentioned, viz., that the clause refers only to acts of state, or acts authorized by the sovereign authority in the country. An unauthorized seizure or detention, as by a mob in a meal riot, does not come within the clause, though the underwriter would be liable for it as a loss by pirates or thieves (*l*).

Barratry of the Master or Mariners.

§ 197.—The term barratry, which originally signifies knavery or trick, has been interpreted by our courts to mean any wilful misconduct, either fraudulent or in violation of the law, which is committed by the captain or crew without the connivance of the shipowner, and which tends to the shipowner's prejudice, either as injuring or exposing to risk of injury his property or the property entrusted to his care, or as exposing it to the risk of forfeiture or seizure for penalties on account of the breach of law. Barratry is a crime, and therefore no mere error of judgment can amount to it (*m*). It need not however be fraudulent, or intended for the private benefit of the master or mariners: any unauthorized breach of the law, exposing the owner to penalties, is barratry, though it were intended for the advantage of the owner (*mm*).

Examples of fraudulent barratry are, scuttling the ship, running away with her (*n*), embezzling the cargo and unlawfully selling it and making away with the proceeds, or mischief done to ship or cargo by mutineers (*o*). Examples of barratry through mere illegality are, smuggling (*p*),

(*l*) *Nesbitt v. Lushington*, 4 T. R. 783.

(*m*) *Todd v. Ritchie*, 1 Stark. 240.

(*mm*) See *per* Willes, J. in *Grill v. General Screw Collier Co.*, L. R. 3 C. P. at 610.

(*n*) *Falkner v. Ritchie*, 2 M. & S. 290.

(*o*) *Elton v. Brogden*, 2 Str. 1264; *Toulmin v. Anderson*, 1 Taunt. 227.

(*p*) *Havelock v. Hancill*, 3 T. R. 277.

illegal trading (q), breach of port regulations, exposing the ship to seizure or penalties (r), and the like.

§ 198.—It is not barratry if the owner connives at it ; and connivance may be inferred from a want of reasonable vigilance, as where a captain had gone on smuggling for three successive voyages without interference on the part of the owner (s). By the owner must here be understood that owner who has the immediate control over the master and crew, that is to say, the power of dismissing them. Thus where a ship is demised to a charterer for a term, the charterer having the power of appointing and dismissing the master, it is the charterer whose connivance is in question (t).

§ 199.—A ship-master who is also part owner can commit barratry as against his co-owners and their underwriters, though of course not against the underwriters of his own share (u).

All other Perils.

§ 200.—The effect of this clause has already been explained. After a number of particular instances have been given, this clause is added, to show that these are examples merely and not boundaries of the insurer's liability. Every other loss of a like nature, though it be such as was not imagined or thought of or in any way present to the mind of insurer or assured when entering into the contract, is undertaken by the insurer.

§ 201.—The sensible rule of English law now is that the assured, in claiming on the insurer, is not bound to declare in his pleadings on which particular peril he founds his claim, but may claim generally under "the perils insured against." This sweeps away a number of

(q) *Earle v. Rowcroft*, 8 East, 434.
126.

(r) *Knight v. Cambridge*, see 8
East, at 136.

(s) *Pipon v. Cole*, 1 Camp.

(t) See cases cited in Arn. Ins.
p. 768.

(u) *Jones v. Nicholson*, 10 Ex.
28.

nice and idle questions, to be found in the older lawbooks, as to whether this or that loss is more properly attributable to this or that peril. It is no longer necessary, therefore, to discuss under what head an underwriter is liable for such losses as, damage done to a ship by being blown off the ways in a dry dock (*v*), damage to tobacco by the fumes of sea-damaged hides (*w*), or the like: it is enough that all such losses, the result of violence or of some accident out of the common course of things, certainly come within the "perils insured against."

§ 202.—Concerning rats, worms, and swordfishes, a word or two may here be said in conclusion. Damage directly done by rats, as for instance by gnawing holes in the ship's bottom, whereby she was rendered unfit for sea, has been decided not to be a peril insured against (*x*). If, however, a rat should gnaw through a leaden pipe, and thereby let in water which sinks the ship, the underwriter would no doubt be liable (*y*). If a swordfish drives its snout through a plank, it has never been questioned that the underwriter must pay for it. Worming is an example of the same kind on a smaller scale. Damage done by worms to the planking or timbers of wooden ships can be effectually prevented only by copper or metal sheathing. If, through accident, such as a grounding, the sheathing is anywhere rubbed off, and worms get in through the unprotected part, such damage must be borne by the underwriters: not so, if a ship unprotected by metal sheathing is sent into seas infested by worms (*z*). This, in such a case, would be a loss which must, not which may, ensue.

§ 203.—Loss or damage by explosion (*zz*), whether of gunpowder, acids, or chemicals, is clearly recoverable under

(*v*) *Phillips v. Barber*, 5 B. & Ald. 161. Exch. 166.

(*w*) *Montoya v. London Ass. Co.*, 6 Exch. 451.

(*x*) *Hunter v. Potts*, 4 Camp. 203.

(*y*) See *Laveroni v. Drury*, 8

(*z*) *Rohl v. Parr*, 1 Esp. 444.

(*zz*) So the bursting of a steamer's boiler; *W. India and Panama Tel. Co. v. Home and Colonial Mar. Ins. Co.*, in App. Nov. 15, 1880.

the policy, as resulting from accident or violence from without. So is damage done to one kind of goods as the effect of sea-damage done to another kind. Thus where by sea-peril copra was heated, and this, conjointly with the effects of a gale, caused derangement of stowage to oil casks, whence there was leakage of oil, the underwriters on the oil were held liable. It would be otherwise, it was said, if the heating of the copra had been spontaneous (a).

CONSEQUENCES OF THE PERILS.

§ 204.—All that remains to complete this chapter is the question how to deal with losses resulting from the combined action of a peril insured against and a cause for which the underwriter is not liable.

The principles, under which every combination of the facts must be brought, are these: 1.—every cause carries along with it its natural effect, or that which follows it in the common course of things, so that these last are not to be treated as distinct causes (b): 2.—among distinct or independent causes, we are to look to that which comes nearest in point of time to the loss: 3.—when one cause is the personal fault of the claimant, the effects of this, whether near or remote, must be wholly excluded from the claim (c).

The possible combinations of facts involving the question before us may be grouped under the following heads:

(a) *Koebel v. Saunders*, 17 C. B. (N. S.) 71.

(b) Where there is one efficient cause only "there is no opportunity for the application of the doctrine of *causa proxima*, which implies existence of two causes." (*Per Brett, J. in Dudgeon v. Pembroke*, 1 Q. B. D. 96, at 119.) This distinct cause, it is conceived, must be something either accidental or voluntary, using both these terms in the popular sense, since if nothing accidental or out of the common

course occurs, and no act of volition intervenes, what follows is only the natural consequence of the one cause.

(c) This last principle is contained in the law maxim, "*dolus circuitu non purgatur*." (*Thompson v. Hopper*, 6 E. & B., at 948.) It follows necessarily from the fundamental principle of insurance law, that an underwriter is in no case liable for losses occasioned by the fault of the assured himself. (§ 183.)

sea peril and unseaworthiness, sea peril and fault of the crew, and sea peril and some peril expressly excluded, as in the case of a policy which contains an exclusion of the risks of war.

Sea-peril
and unsea-
worthiness.

§ 205.—If a ship, insured by a time-policy and therefore not *warranted* seaworthy, sails on her voyage in an unseaworthy condition and is lost in a gale, and if the facts are such that we can say she would not have been lost by being unseaworthy had not the gale come on, and would not have been lost in the gale had she not been at first unseaworthy, so that both causes come into play, in that case the rule of law is that the underwriters are liable, unless the assured is himself to blame for the unseaworthiness.

The reason of this is clear from the principles above laid down. The unseaworthiness and the gale are two distinct and independent causes, which between them bring about the loss ; and the gale is that which comes later. Unless, therefore, the third principle can be applied, the second principle makes the underwriter liable (*d*).

§ 206.—If, however, the unseaworthiness is the sole operating cause of loss, the underwriter is not liable, notwithstanding that the ship may sink, so that by an overstrained application of the maxim *causa proxima*, &c. it might be argued that the proximate cause of loss was the sinking, or a peril of the seas. Sinking is not active enough to be styled a cause of loss. Hence, where a ship insured by a time-policy foundered during fine weather from no assignable cause, it was left to the jury to say whether the leak from which she foundered was attributable to injury and violence from without, or to

(*d*) *Thompson v. Hopper*, 6 E. & B. 937 ; see also s.c. on demurrer, 6 E. & B. 172 ; *Dudgeon v. Pembroke*, L. R. 9 Q. B. 581, 1 Q. B. D. 96, 2 Ap. Ca. 284. The distinction between the two cases is this : in the former, the assured was personally

in fault, for having knowingly sent his ship into the roadstead in a state of unpreparedness for sea, merely in order to save time, while in the latter case the unseaworthiness arose from a latent defect which had eluded all reasonable care.

weakness from within ; since in the latter case the underwriters would not be liable (*e*).

§ 207.—The faults or neglects of the crew, or others on shipboard, stand on a different footing from the personal faults of the assured. The underwriter is liable for losses which in one sense may be called the direct consequences of the crew's neglect or misconduct. Where a drunken mate put a lighted candle under his bed, and set fire to the ship, the underwriters were held liable as for loss by fire. Where a collision occurs in fine clear weather, merely through porting the helm instead of starboarding, there is no other efficient cause of the damage but the blunder of a sailor, and yet there is no doubt the underwriter is liable. Where goods on board a steamer were damaged by seawater admitted into the hold through the negligence of an engineer in leaving open a bilge-cock, the underwriters were held liable. It was argued by counsel on their behalf that, before they could be made answerable for the neglect of the crew, there must be shown the intervention of some peril, *i.e.*, some active force. But Willes, J. delivering the judgment of the Court, pointed out that this is not so in the case of a collision in clear weather, where there is no intervening peril, accident, or violence, but the damage is a necessary consequence of the mistake. The negligent act of the engineer might be considered as an accidental circumstance (*f*).

§ 208.—We must conclude apparently that there is a distinction between the result of unseaworthiness and the

(*e*) *Merchants' Trading Co. v. Universal Marine Ins. Co.*, as given in L. R. 9 Q. B. at 596. The same principle is contained in *Fawcus v. Sarsfield*, 6 E. & B. 192, where it was held that the underwriter on a time-policy was not liable for the expense of seeking a port of refuge, it being dangerous to remain at sea by reason of leakage caused by un-

seaworthiness,—in other words, to avoid the risk of sinking from that cause.

“That which is the natural and necessary consequence of the nature of the sea is not a *peril* of the sea.” (*Per Cockburn, C.J. in Patterson v. Harris*, Jur. 161.)

(*f*) *Davidson v. Burnand*, L. R. 4 C. P. 117.

Sea-peril
and fault
of crew.

result of a sailor's fault; that, to render the underwriter liable for a loss which would not have occurred had the ship not been unseaworthy, there must be the intervention of some active peril, but to render him liable for a loss which would not have occurred but for the fault of a seaman, this is not necessary. This is really equivalent to saying, what has not yet been expressly laid down by the Courts, that an underwriter is liable for sea damage directly occasioned by the fault of the master or crew.

Sea-peril
and peril
excepted.

§ 209.—When a policy is effected with exclusion of some particular peril,—as for instance with the clause “free from all consequences of hostilities,”—this has the effect of placing the excluded peril on precisely the same footing as unseaworthiness without fault of the assured under a time-policy; that is to say, when a loss arises from the conjoint operation of a peril insured against and the peril thus excluded, we are to enquire which of the two was the proximate cause. This appears from the following decision:—

During the American war, the light on Cape Hatteras was extinguished by the Confederate troops for military reasons. Owing to the absence of this light the captain of a ship missed his reckoning, struck on a reef of rocks, and became a wreck. The cargo consisted of 6500 bags of coffee, of which 1020 bags would have been saved if the salvors had not been prevented by the Confederate troops, who themselves only succeeded in saving 170 bags, which they kept for their own use. This coffee was insured “free from all consequences of hostilities.” On these facts, the Court of Common Pleas held that the underwriters were liable for the loss of all but 1020 bags. The case was to be dealt with, they said, as if there were two policies, one on the war risk, and the other on the sea risk: and the question here was, which of the two was the proximate cause of loss. Now as to the 1020 bags, it was the Confederate forces which directly prevented the saving, and so caused the loss, of that portion.

But the extinguishing of the light was only the remote cause of the loss of the remainder, the proximate cause being the striking on the reef, which could not be said to follow as a natural or ordinary, still less as a necessary, consequence of the extinguishing of the light (*g*).

(*g*) *Ionides v. Universal Mar. Ins. Co.*, 14 C. B. N. S. 259. Some illustrations given in the judgment, though of course dicta merely, are too valuable to be here omitted. Erle, C. J., put the following imaginary cases :—Suppose a ship-master, chased by a cruiser, to avoid capture, runs ashore, or runs into a bay where there is neither harbour nor anchorage, and being unable to beat out is driven ashore, the loss or damage by such grounding is a consequence of hostilities, and within the exception : not so, if in the second case supposed she does come out of the bay and pursue her voyage, but is afterwards lost in a storm which she would have escaped had she not been pursued

and changed her course. Suppose, again, the ship is going to a port where there are two channels, in one of which a torpedo has been laid by the enemy. If the master, not knowing this, goes into the channel where the torpedo is, and is blown up, this is within the exception ; not so if, knowing of the torpedo, he takes the other channel to avoid it, and by unskilful navigation runs aground there. Willes, J., said that the introduction of the word “consequences” made no difference whatever, and that adding the word “all” could not bring in more remote consequences than if that word were not there.

CHAPTER V.

TOTAL LOSS.

General Principles.

§ 210.—FROM considering what kinds of loss are borne by an underwriter, we pass naturally to the classification of losses in respect of their quantity; *i.e.*, according as they are total or partial. Total losses are to be distinguished carefully from partial or “particular average” losses, not only on account of the difference in the mode of adjustment, but because insurance is frequently made against total loss only, or “free of particular average.”

§ 211.—A total loss may from one point of view be defined to be, a loss of such a nature that the insurer is to pay the full insured or insurable value of the thing insured, taking to his own use whatever may be saved. In an average or partial loss, on the other hand, the thing insured always remains the property of the assured, whose claim on the insurer is simply for indemnity against loss or damage suffered in respect to it.

General
definition.

§ 212.—A thing may be said to be totally lost, when it has ceased to be, and cannot again be made, that thing which it originally was; of which there is no better test than its being unfit to do the work it was originally intended for. A ship, in this sense, is totally lost, when it no longer exists as a ship, capable of navigation, nor can by possibility be restored to that condition; and this notwithstanding that every particle of its fabric may still

remain, whether in the shape of driftwood on the sea-shore, or as a solid mass which hangs together and retains the form of a ship, yet can never do a ship's work. A cargo of hides is totally lost if by decomposition the hides are spoilt for tanning, notwithstanding that the ship's hold may be filled with as large a quantity of manure.

§ 213.—Again, in matters of business there is such a thing as a financial or pecuniary impossibility, in its way as absolute as any other. It is in this sense impossible for a reasonable man, without ceasing to be such, to spend on a thing more than it will afterwards be worth. "A man may be said to have lost a shilling," says Maule, J., "when he has dropped it into deep water, though it might be possible, by some very expensive contrivance, to recover it" (a). Thus we are brought to a second class of total losses, namely, where it is possible to repair a ship or carry a cargo to its destination, but would cost more than the operation would be worth.

The distinction between these two classes of loss is ^{Actual and constructive total loss.} marked by a difference in the name,—the former kind, where to restore the thing insured to its original character or purpose is physically impossible, being called an *actual* total loss,—the latter, where to do so is possible, but not worth the cost, a *constructive* total loss, or total loss in construction of law.

§ 214.—In every case of total loss, as has been said, ^{Benefit of salvage.} the underwriter, who pays to the assured the full value, is entitled to whatever may remain of the thing insured,—to the broken pieces or wreck, to the chance of the ship's being lifted if it be sunk, of its recapture if taken by the enemy, or of its unexpected arrival after being supposed lost at sea, together with any advantages incident to such ownership of the "contingent remainder," as for example a right to claim damages against the wrongdoer in a collision. The underwriter, in short, paying the loss, becomes the owner of the thing he has insured, with all the rights

(a) *Moss v. Smith*, 9 C. B. 94, at 103.

Notice of
abandon-
ment.

of an owner. An abandonment to him by the assured of all these rights, whether expressly made or not, accompanies as a matter of course the payment of a total loss.

But in cases of constructive total loss, something more than this is requisite. To repair or reinstate the thing insured to its original condition being physically possible, the underwriter is entitled to such timely notice of the intention of his assured not to make the attempt, as may enable him to watch the proceedings, so that, even should he not himself elect to save or to repair the property on his own account, he may at least make sure that the circumstances justify the assured in not doing so. This notice is called, a notice of abandonment.

We are to consider then, first, what is the state of facts which renders the claim on a policy one for total loss ; and secondly, on the occurrence of such a state of facts, what are the rules of law with regard to abandonment, and the notice of abandonment. Each of these topics must be considered as affecting merchandize, ships, and freights, separately.

1. *Total Loss of Cargo.*

§ 215.—A total loss, under a policy on goods or merchandize, takes place when the whole subject-matter of insurance is either destroyed or lost, or changed into something of a different species, or cannot be carried to its destination either at all or without undergoing a change of species by the way, or except at an extraordinary expense exceeding its value.

Must be
the whole
of some one
kind of
commodity.

§ 216.—First, it must be the whole ; that is to say, the whole of some one species of merchandize, belonging to the same person, insured in the same policy. When we speak of a "total loss of a part," the word "total" really means nothing, for total loss of part is equivalent to a partial loss of the whole, and so no more than "loss of a part." But there may be two "wholes" insured in one

policy, and the underwriters may be liable for the total loss of one of them, though the other be safe.

It is evident that we are here upon ground where our rules must be somewhat arbitrary. In fact, the rule has fluctuated, and there is still some uncertainty about it. What is, for this purpose, a "whole"? A grain of wheat, or an aggregate of grains, out of a larger parcel of wheat in bulk, clearly is not. If the wheat is shipped in bags, is one bag a whole? If I ship twenty balks of timber, is each balk a whole?

So far as the English law is concerned, speculations of this kind have been to a great extent settled or silenced by authority. It has been laid down that the entire destruction of some out of more grain in bulk is not a total loss; therefore is not recoverable under a policy on the grain warranted "free of particular average" (b). It has been laid down that where the insurance is on rice in bags, valued at a lump sum, the entire destruction of a number of the bags, less than the whole, is not a total loss (c). And, though the point has not been expressly determined, the better opinion seems to be that the result would be the same, had each bag been separately valued in the policy (d). On the other hand, where two distinct species of commodity are insured in the same policy, as, for example, nautical instruments and clothes in a policy on captain's effects, warranted free of average, the underwriter would be liable for a total loss of the instruments, though some of the clothes were saved (e). What are, for this purpose, distinct species, may be sometimes a difficult question: no doubt, for example, woollens are distinct from cottons, but are bleached shirtings distinct from unbleached?

§ 217.—Not only the destruction, but a change of species, resulting from sea-peril, whereby the thing in-

(b) *Hills v. London Ass. Co.*, 5 M. & W. 569.

(c) *Ralli v. Janson*, 6 E. & B. 422.

(d) See Appendix B.

(e) *Duff v. Mackenzie*, 3 C. B. N. S. 16; and see *Wilkinson v. Hyde*, 3 C. B. N. S. 30.

sured becomes something else,—hides, for example, converted into manure,—operates as a total loss. “It surely cannot be less a total loss,” says Lord Ellenborough, “because the commodity subsists in species, if it subsists only in the form of a nuisance” (*f*).

Loss of
voyage.

§ 218.—Again, not only the destruction or worthlessness of the thing itself, but the mere impossibility of its reaching its destination, so as to perform the voyage insured, may be enough to constitute a total loss; for what is insured is, not merely the goods, but their performance of the intended voyage. Thus, where hides, insured from Valparaiso to Bordeaux, were necessarily sold at Rio de Janeiro, because by sea-damage they were reduced to such a state that if carried on they must cease to be hides before they could reach Bordeaux, this loss, though they were sold for £273 as hides to be tanned, was held to be total (*g*). And the same decision was come to, where a cargo of coals was sold at a port of refuge, because the coals, having been wet by sea-water, could not be re-shipped because of the danger of combustion (*h*). The rule must, it is conceived, be the same, if, though the goods themselves were intact, it became impossible to carry them on, because the original ship was disabled by sea-peril and no other conveyance to be had (*hh*).

Excessive
cost of
forwarding.

§ 219.—Finally, there may be a total loss, notwithstanding that the damaged goods might possibly be carried to their destination, if the extraordinary expense of doing so would exceed the value of the goods themselves. For, in such a case, the carrying of the goods to their destination has become in a mercantile sense impossible, in the way illustrated by Mr. Justice Maule, since a reasonable man would rather leave the goods to perish than go to the expense of forwarding them (*i*).

(*f*) *Cologan v. London Ass. Co.*, N. S. 419.
5 M. & S. 447, at 454.

(*g*) *Roux v. Salvador*, 3 Bing.
N. C. 266; 1 Bing. N. C. 524.

(*h*) *Saunders v. Baring*, 34 L. T.

(*hh*) See *Hunt v. Royal Exch.*
Ass. Co., 5 M. & S. 47, at 56; and
see Appendix C.

(*i*) *Rosetto v. Gurney*, 11 C. B.

Concerning this case it is to be noted that the learned judges who have decided it appear to have fallen into an arithmetical error. They have laid it down that, to constitute a total loss in such a case, the *extraordinary* expenses of forwarding, *i.e.* the expenses after deducting the ordinary freight, must exceed the *gross* value of the goods, or their value *without* deducting the ordinary freight. And yet it is as demonstrable as the easiest sum in arithmetic that the effect of thus bringing in the freight twice over is fatal to the principle on which the rule is professedly based, at any rate in case the original ship has been disabled (*j*). In that case the two things to be compared ought to be, the whole cost of forwarding, and the whole sum for which the goods when forwarded may

176; *Farnworth v. Hyde*, L. R. 2 C. P. 204. The amount for which the damaged goods may be sold at the port of refuge is not to be taken account of. This is right, because the question is not whether a sale at the port of refuge would be a profitable speculation, but whether the goods, as goods to be carried to their original destination, are wholly lost. The distinction between bringing into this comparison of amounts the proceeds of cargo in such a case, and the proceeds of the hull for breaking up, is, that merchandize sold at a port of refuge is still merchandize, but the broken up materials of a wreck are not a ship. (See also *Reimer v. Ringrose*, 6 Exch. 263.)

(*j*) The argument on which the judgment in this respect is based is to be found in L. R. 2 C. P. 220, 225 and 226, and a careful examination of it will show that this oversight, of bringing in the freight twice over, or on both sides of the account, lies at the bottom. There is no total loss by sea-peril, it is

argued, unless the whole value of the cargo is exceeded by the expense resulting from sea-peril: now the whole value of the cargo is, its value including, or without deduction of, the freight; and the freight under the original bill of lading is not an expense resulting from sea-peril. The fallacy here is, not perhaps obvious, but undeniable when pointed out. The value of the cargo to the merchant or owner of it is not the gross proceeds, but those proceeds minus the ordinary freight. If on the other hand the question is as to the whole value of the cargo to *some one*, no matter whether the owner of the cargo or of the ship, then to some one the entire cost of forwarding it by another vessel, the original ship having been disabled by the perils insured against, is an expense resulting from those perils. That is to say, in computing the value, the interests of shipowner and cargo-owner are added together, but in estimating the expenses, the interest of the cargo-owner alone is looked at.

be sold ; and if the former exceed the latter, no reasonable man would go to the expense of forwarding.

§ 220.—These, then, are the conditions of a total loss of merchandize ; and nothing short of them will suffice. If any part of any one commodity reaches its destination without undergoing such a change of species as above described, it matters not how small a part, nor how badly damaged, not though it sells for less than the freight on it, or less than the bare charges of selling it ; it is no total loss of that commodity. Nor again is it a total loss, if the cargo be sold at a port of refuge without a necessity so absolute as has been here described. No mere convenience or advantage in selling it there, such as its fetching a better price, the avoiding increased deterioration from a prolonged carriage, or any motive which stops short of necessity, will suffice.

Goods sold
unidenti-
fied.

§ 221.—By reaching their destination is meant, not necessarily reaching the hands of the intended consignee, but simply reaching the port or place. Supposing they arrive there with the marks effaced, so that the goods of several consignees are undistinguishable, and all have to be sold together by some one person, and the proceeds distributed, this does not constitute a total loss (e).

2. *Total Loss of Ship.*

§ 222.—A total loss under a policy on ship takes place when the ship is either destroyed or lost, or reduced to a condition of irreparability,—that is to say, either cannot at all, or cannot but at a cost exceeding its value, be so repaired as to be restored to the character of a ship, or cargo-carrying vessel.

What is meant by irreparability requires a fuller explanation.

What is
irrepara-
bility.

§ 223.—To constitute a total loss, it is not enough that the ship cannot be so repaired as to be made as good a

(e) *Spence v. Union Mar. Ins. Co.*, L. R. 3 C. P. 427.

ship as she was before, or fit for the same trade. If my ship, which I built and intended to carry fine goods, can be so repaired as to be a serviceable carrier of timber, though she may be of no use to me who am not in the timber trade, it cannot be said that she is totally lost as a ship, for in that capacity she is of value to some one (*f*).

§ 224.—It is an actual total loss, if the ship cannot be repaired at all; which may be, either because she is broken to pieces, or because there are no appliances for repair within reach. This latter case arises, when the ship can only be repaired in a dry dock, and is too leaky to be moved to any place where a dry dock is to be had, and there is no way of temporarily stopping the leak. Here, and in similar cases, it is not a question of cost: to repair so as to restore the character of a sea-going ship is impossible (*g*).

§ 225.—It is a constructive total loss, if the ship can be repaired, so as to be made navigable as a ship, but only at an expense which a prudent owner, if uninsured, would not incur, because it would exceed the value of the ship when repaired. Here we come at once on two questions: in order to make this comparison, what is to be taken as the cost of repairing, and what as the value of the ship when repaired?

§ 226.—The cost of repairing, it is evident, must for this purpose be the minimum, or cost of repairing in the cheapest way practicable under the circumstances. If it

The cost of repairing.

(*f*) "The question is whether the damage sustained may be so far repaired as to keep it a ship, though not perhaps so good a ship as it was before." (*Per Blackburn, J., in Rankin v. Potter, L. R. 6 H. L., at p. 117.*) And see *Gardner v. Salvador, 1 M. & R. 116.* "A ship must be so repaired as to be seaworthy to carry cargo," *per Cockburn, C.J., in Potter v. Rankin, L. R. 5 C. P. 341, at 367.* Thus there is a distinction, which seems to have

crept in insensibly, between a voyage policy on ship and one on cargo, in this respect, that under the former a loss of the voyage is not treated as constituting a total loss of the thing insured, while under the latter it is. (*See Fitzgerald v. Pole, 4 Brown's Parl. Ca. 439; Doyle v. Dallas, 1 M. & R. 48; Parsons v. Scott, 2 Taunt. 363.*)

(*g*) See *per Willes, J., in Barker v. Janson, L. R. 3 C. P. 303, at 305.*

would be more expensive to repair on the spot than to send the ship to some other place for the purpose, then the amount to be taken as the standard of comparison must be, the cost of repairing at the latter place, adding the expense of removal and of any temporary repair requisite for removing her.

§ 227.—In considering what repairs are to be taken into account, the determining question, what would a prudent owner do if uninsured, is never to be lost sight of. It may be asked, for example, whether the cost of replacing decayed timber or other defects for which the insurer is not answerable, should be brought in. The answer must be that, if a ship which in spite of these defects was seaworthy has by a peril insured against been rendered unseaworthy, then the only questions are, how much will it cost to make her seaworthy again, and how much will she then be worth. If she cannot be made seaworthy again without removing the decayed timber, then the expense of doing so forms a part of the repair to be taken account of; but in that case on the other side must be placed, the value of a ship from which the decayed timber has been removed (*h*).

Ought the
old materials
to be
brought in?

§ 228.—Ought account to be taken of the sum for which the old materials of the ship, if she be not repaired, may be sold? It is an item which an uninsured owner certainly would take account of. To spend £5,000 in repairing a ship which would then be worth £5,200 would not be a prudent act, if the wreck would have fetched £500 for breaking up. It would seem, therefore, that this item should come in. Care must be taken, however, only to bring in the value of the wreck for breaking up, or for purposes other than navigation; or else what is really a partial might be converted into a total loss. It might for example be more profitable to sell a ship in her damaged state and let the purchaser repair her, than for the original owner to repair; but it would be unreasonable to say that

(*h*) *Phillips v. Nairne*, 4 C. B. 343; and see *Phillips Ins. No. 1547*.

in such a case the ship is totally lost; while on the other hand a ship is none the less totally lost, though the materials be of some value if broken up for firewood or similar purposes (i).

§ 229.—We are in the next place to consider the other term in the comparison, namely the value of the ship when repaired. The value of the ship

Concerning this, the first thing to be noted is that the valuation in the policy is not the test for the present purpose. It has been argued, not without force, that as the question of constructive total loss is a question between assured and insurer only, and as they two have agreed together on a valuation of the ship, it should not be open to the assured with one breath or for one purpose to say that the ship is worth so much, and for another that she is worth something more or less. But this reasoning has been overruled by the authority of the House of Lords (j), and it must now be taken as settled law that, although the underwriter must pay the loss, if it is total, on the basis of the agreed valuation (k), yet for the purpose of determining whether the loss is total or not this valuation should be left out of sight, and no other value considered but the ship's actual worth to her owner. is not value in policy.

§ 230.—What, then, is a ship's worth to her owner? If we are to take that sum which a prudent uninsured owner would really bring into his consideration and set against the cost of repairing, we must take the ship's value to him at that particular time and place, and having regard to all the circumstances. It must be her value to Test of value to owner.

(i) See *Young v. Turing*, 2 Scott, N. R. 752, at 764. The propriety of the decision on this point has been much questioned: some still hold that the old materials ought not to be taken account of.

(j) *Irving v. Manning*, 1 Ho. Lds. Ca. 287.

(k) The policy-value is to be paid,

whatever may have been the condition of the ship at the time of the loss; e.g., no deduction is to be made in respect of stores previously consumed, or damage suffered on some previous voyage and not then repaired. (*Barker v. Janson*, L. R. 3 C. P. 303; *Lidgett v. Secretan*, L. R. 6 C. P. 616.)

keep as well as to sell ; for though a ship can never be worth less than she would sell for, she may, in the case of a ship having special merits only known to or appreciated by the owner, special adaptation to his particular trade, even in some cases special flag-privileges, be worth very much more. The place where she is may affect her value ; a ship being of course worth more when she is at her loading port or freight-market than when she is at a place from whence she must make a trip in ballast in order to fetch or seek a cargo. And, even more conspicuously, a ship's value may be affected by her contracts : one which is on the point of earning a large freight being more valuable than if she were in quest of a fresh engagement. The judgment a prudent owner would form as to the propriety of repairing would vary with all these variations.

In order, then, to determine what value of the ship should be measured against the cost of repairing, we clearly must in many cases look further than to the market price, in the home port. For practical purposes, the market price may generally be taken as the minimum or starting-point : then we are to enquire whether there is any peculiarity about the ship herself which renders her more valuable to her present owner than she would be to a chance buyer in the market, and if so to make a suitable addition to the price : then enquire how near the ship is to her freight-market, or that port at which her profitable employment is to begin ; and lastly consider whether her existing engagements do not give her an additional value for the time, from the circumstance that the loss of the ship would carry with it a loss of her earnings on the voyage.

§ 231.—This last augmentation of value may be defined somewhat more closely. The market value of a ship is usually based on the supposition that the ship is deliverable to the purchaser forthwith. The purchaser therefore counts on having her ready for profitable employment, if he can find any, at once. A ship which is chartered for a voyage

not yet terminated may no doubt be worth more than one which is in this sense free, since she has the chartered freight secure ; but if this freight be excluded, she is worth less, and this in proportion as the unexpired duration of the voyage is greater. Hence the augmentation of a ship's value by reason of her having a freight engaged never can extend to the full amount of the freight. If she is near the end of her voyage, it may come very close to it ; not so if she is only beginning. At the outset of a voyage, a ship that is chartered may even be less valuable (including her chartered freight) than one that is free ; for the rates of freight may have risen in the meantime (1).

All these circumstances must be taken into account in determining the value of a ship for the purpose in question, if we are really to carry out the principle that a loss is only total in case a prudent owner uninsured would not repair.

It might perhaps be thought that as the question before us is merely whether the *ship* is totally lost, and as the ship is insured separately from the freight, the value of the ship alone, excluding the freight, should be taken account of. This however cannot be ; for the conduct of a prudent owner can only be determined by taking account of both. It might with equal justice be said that when we came to the question, what is a total loss under a policy on freight, the cost of repairing should be measured against the amount of freight, excluding the ship. This

(1) At the outset of a voyage, the fact of being chartered only enhances a ship's value if the freight-market has gone down since the charter was made, and then only to the extent of the drop.

Cleasby, B., speaking of the right obtained by a shipowner through having a charter to carry cargo on a voyage not yet commenced, says : "It is a right which may be of considerable or of little value. If,

for instance, the chartered freight is high in relation to the current rate at the port of lading, and the charterer is a solvent person, then the right is of considerable value ; but if the current rate is higher than the chartered freight, or the charterer has become bankrupt or insolvent, it is of no value" (in *Potter v. Rankin*, L. R. 5 C. P. 341, at 355).

very case indeed has been brought before the courts: but Wilde, C.J., said, "We are asked, would any man in his senses spend £1000 upon the repairs of a ship for the mere purpose of earning £500 freight? To this I answer, certainly not: but this is not the true question: if, by expending £1000 upon the repairs, he gets not only £500 freight but also a ship worth £3000, who will for a moment question the prudence of the outlay?" (*m*). This reasoning, it is evident, reversing the figures, applies just as much to the ship as the freight (*n*).

3. *Total Loss of Freight.*

§ 232.—A total loss of freight may take place, either, 1st, because the cargo is rendered incapable of being carried; 2nd, because the ship is disabled from carrying it; or 3rd, because the cargo cannot be carried without such delay as justifiably leads to the throwing up of the contract.

Freight, it must throughout be borne in mind, is only insurable because and so far as it has an existence separable from the ship, as having been defined and rendered certain by a contract. What is insured, then, is the freight to accrue to the assured under a contract subsisting at the inception of the risk; and the question, it seems to follow, must always be, not whether some, but whether this, freight is totally lost (*o*).

1. Loss by
disabling
of cargo.

§ 233.—First, then, as to loss of freight by reason of loss or damage of the cargo:—

The contract, whether bill of lading or charter-party, is, speaking generally, an undertaking to carry a specific cargo, or one shipload, and that only. As to the bill of

(*m*) *Moss v. Smith*, 9 C. B. 94, at 108.

(*n*) See, in confirmation of this, a dictum by Martin, B., in *Rankin v. Potter*, L. R. 6 H. L. 83, at 145.

(*o*) As to the freight, so called,

earned by carrying the shipowner's own goods, or prepaid freight, which is insurable on similar grounds, these interests follow the rules applicable to cargo, not to freight, in respect of the liability to total loss.

lading, the goods to be carried are usually specified on the face of it. And a charter to carry a full cargo means no more than to carry one shipload. Thus where a fire broke out on board a chartered ship, after a portion of her coal cargo had been shipped, and by the water poured in the coal was so damaged as to be unfit for reshipment, the charterer was held not to be entitled to replace this by fresh coal, but only to supply, under the terms of the charter, so much as had not been shipped at the date of the fire (oo). Since, then, under the ordinary contract of affreightment, the disabling of the one cargo contracted for necessarily carries as a consequence the loss of the specific freight insured, it seems natural to conclude that, if this disability for carriage extends to the entire cargo, there must be a total loss under the policy.

§ 234.—Cargo is disabled from being carried, when it is destroyed, when it cannot be carried with safety to the ship, or without undergoing a change of nature, as by putrefaction, that will make it worthless, and likewise when the carrying of it has become impracticable from considerations of expense; as for instance in those cases of constructive total loss of cargo considered in section 219, where cargo cannot be dried or made fit for re-shipment but at an expense exceeding its own value and the freight on it. In these cases, there is a pecuniary impossibility of earning the freight, which must have the same effect on the freight-policy as on the policy on cargo.

§ 235.—To make it a total loss, the disability must extend to the entire freight covered by the policy. This does not in all cases render it necessary that the entire cargo shall be disabled. For, under some charters, the freight insurable by the shipowner, as being at his risk, is a balance only, and such a balance as may be completely swept away by the destruction or otherwise disabling for carriage of a portion only of the cargo. Where for example a lump sum, or a sum computed on the quantity

Case where
part freight
prepaid.

(oo) *Adamson v. Gill*, 16 Weekly Reporter, 639.

Total loss : of freight.

shipped, is prepaid, and is to be deducted from a freight the amount of which depends on the quantity delivered, a diminution of the latter quantity may have the effect of totally extinguishing the balance otherwise due at the end of the voyage. When that is the case, it is settled, on the authority of the House of Lords, that the underwriter on freight is liable for a total loss (*p*).

§ 236.—Suppose, however, that a total loss of the freight on the original cargo has arisen in any of these ways, the question still remains whether, in case the insurance be simply on freight for a voyage named (*q*), and, the loss of freight having taken place early in the voyage, a second cargo is shipped under a fresh contract but for the same voyage, this circumstance can in any way affect the liability of the freight-underwriter. In such a case, can it be said, either that there is no total loss of the freight on the voyage insured, or that, granting there is a constructive total loss, the second freight earned must be treated as a salvage to the underwriter, or deduction from the amount of his liability?

Here we seem to come upon a conflict between strict right, or the carrying out of the letter of the contract, and what may be termed an equitable interpretation of the principle of indemnity. Strictly speaking, it is certain that the thing insured is the freight under the original contract, and the thing insured is none the less totally lost, because some other thing, it may be of as great or greater value, is obtained by the assured and would not have been obtainable but for the loss, and so in a sense may be said to be substituted for the thing lost. On the other hand, it seems somewhat unreasonable that while the underwriter pays a total loss of freight, the shipowner shall receive what is virtually a second freight on the same voyage.

(*p*) *Allison v. Bristol Mar. Ins. Co.*, L. R. 1 Ap. Ca. 209.

(*q*) If the policy were "on char-

tered freight," no arguable question, it is conceived, could arise on the point.

The point has not, I believe, been expressly determined in the Courts, though there are dicta of the judges to the effect that, if by the disabling of the cargo there arises a claim for total loss of freight, the assured is bound to abandon to his underwriter any freight that may be thereafter earned on the same voyage (*r*). This raises the question, what is the same voyage,—a question which has been already discussed in this volume (*s*). It is the purpose of the voyage, at least as much as the termini, which constitutes its identity. Where the purpose of the voyage is simply to carry a particular cargo, or to perform such or such a contract of affreightment, that purpose is at an end so soon as the cargo in question is wholly incapacitated for carriage, or the freight-contract absolutely at an end: and the fact that a second cargo is taken to the same place does not of itself make the voyage the same voyage as that originally intended. There may, however, be cases in which the identity of voyage continues after and notwithstanding a total disabling of the original cargo, as for example where a ship belongs to a line of packets, sailing on stated days, and bound to sail irrespectively of any cargoes they may carry; in which case a vessel sailing on the day intended, though not with her original cargo, would certainly be on the voyage originally intended. In an exceptional case of this kind it may be that the second freight would form a salvage for the benefit of the original underwriters; but not so, it is conceived, if, the original cargo having been wholly disabled, the ship is free to go anywhere, and goes by mere accident to the same port for which she was destined originally.

§ 237.—Secondly, as to the total loss of freight which may result from the disabling of the ship:—

2. Loss by disability of ship.

Here, as in the case of disability of the cargo, no other

(*r*) See, for example, *per* Brett, J., in *Rankin v. Potter*, L. R. 6 H. L. 83, at 99; *Barclay v. Stirling*, 5 M. & S. 6; *Everett v. Smith*, 2 M. & S. 278.

(*s*) See § 152.

distinction is to be made between absolute impossibility, resulting from the wreck or irreparability of the ship, and a pecuniary impossibility resulting from the great costliness of repairing, except that the former is an actual, and the latter only a constructive total loss. Whenever such irreparability carries with it a loss of the entire freight at risk which forms the subject of insurance, this is a total loss of freight.

The English law, unlike that of many other countries, recognizes no such thing as a distance-freight, or freight *pro rata itineris peracti*, given by way of compensation for a partial performance of the contract to carry in cases where the completion of it is prevented by an accident of navigation. The cargo must be carried all the way, or no freight is due. The shipowner may, however, if his own ship be disabled, earn the stipulated freight by sending on the cargo in another bottom.

It follows, that an accident which disables the ship as a carrier, produces a total loss of the freight if the cargo cannot be sent on in another bottom at an expense less than the freight under the original contract.

§ 238.—Suppose that it can be so carried, in another bottom, at a profit, can it with any propriety be said that we have here a total loss of freight? There are dicta of the judges from which it appears to have been thought so; since we are told, but only as a remark by the way (*t*), that when a total loss of freight is claimed by reason of the disabling of the ship, there ought to be an abandonment to the insurer of any possible profit or salvage that may ensue upon transhipment. Perhaps indeed these observations only refer to a state of things in which what is known is only that the ship is disabled, and the possibility of earning freight by transhipment is as yet uncertain. If they go beyond this, they must be met by the preliminary question whether it can be correct to say that the freight

(*t*) See, for example, *per* Brett, J., in *Rankin v. Potter*, L. R. 6 H. L. 83, at 102—103.

is totally lost, when it can be wholly earned by the expenditure of a smaller sum,—an expenditure which a prudent uninsured owner would certainly make. The loss is no more total here than in the case of a ship which, by a peril insured against, has been rendered innavigable, but which can be restored to a sound and seaworthy condition by an expenditure less than its value. On this question there is, so far as I am aware, only one case that touches it, and that is not decisive. In *Kidston v. The Empire Marine Ins. Co.* (u) it was decided that the expense of such a transshipment is recoverable under a policy warranted “free of particular average.” This decision went upon the ground that the expense in question was not a loss of any part of the thing insured, but was recoverable under the “sue and labour clause,” or, in other words, was recoverable as an expense incurred to prevent a total loss. This is a very different thing from saying that the loss was total. There was a state of things which would have resulted in a total loss had the expense in question not been incurred, and had the assured not been in some sense bound, as towards his underwriters, to incur it (uu). On the whole, the better opinion seems to be, that if the whole freight can be earned by the expenditure of a smaller sum in hiring another ship, there has been neither a partial nor yet a total loss of the freight insured. If a portion of the freight can be so earned,—as, for example, if there is available no ship that can carry the entire cargo, but a smaller vessel that can carry a part, then there is of course a partial loss of freight, in respect of the portion of cargo left behind. In any case, if any portion of the freight contracted for and insured is or properly can be actually earned, whether in the original ship or one substituted on behalf of the owner of it, there is, it is conceived, no total loss of freight.

§ 239.—A third possible cause of a total loss of freight 3. Loss by

(u) L. R. 1 C. P. 535; 2 C. P. 357.

(uu) *Post*, § 330, n. (h).

delay
through
accident.

is an accident which gives rise to such delay as to justify the throwing up of the contract. This is a comparatively modern doctrine, it being formerly supposed that an underwriter could under no circumstances be liable for a loss directly resulting from delay or loss of time. But it seems to be now settled law that if, after a ship is chartered, but before the cargo is laden, some accident to the ship, such as her running ashore, and thereby needing repair that will occupy a great length of time, occasions a long and unreasonable delay, the charterer may be justified in refusing to wait and supply a cargo at the end of the time ; and that, if he does so refuse, the underwriter on chartered freight is liable for a total loss. The facts, in the case where this rule was laid down, were certainly strong. The ship, on her way to the loading port, was driven ashore, and it was for some time doubtful whether she could be got off, and when she was floated she needed repairs which were to occupy four months. The questions put to the jury were, whether the delay was so long as to make it unreasonable for the charterer to supply the cargo at the end of the time, and whether it was such as to put an end in a commercial sense to the speculation entered upon by the shipowner and charterer ; both which questions they answered in the affirmative. On this finding, the Court, first in the Common Pleas Division, and then in Appeal, pronounced the underwriter to be liable (v).

§ 240.—This decision opens up some important questions. We may assume that the charterer's liberty to throw up the contract on the ground of delay is restricted to the case of delay previous to the shipment of the cargo : since all the older authorities lay it down that if the ship needs repair during the voyage, through accident and not from fault, the merchant is bound to wait. The principle of the decision, viz., that in such a case neither the act of the charterer in throwing up the contract, nor the

(v) *Jackson v. Union Mar. Ins. Co.*, L. R. 8 C. P. 572 ; 10 C. P. 125.

delay, but the accident which occasioned the latter and thereby justified the former, is to be taken as the proximate cause of loss, is certainly defensible on theoretical grounds, but, as has already been pointed out, is not altogether consistent with what has been laid down in other cases (*w*). In both Courts, there was a division of opinion amongst the judges. Any attempt, therefore, to deduce conclusions for analogous cases from the rule in *Jackson v. The Union* must be regarded as extremely hazardous.

§ 241.—There is one case, however, in which the temptation to do so is strong, and that is, where there is a charter with a “cancelling clause.” This clause, which provides that if the ship does not reach her loading port by a day named, the charterer shall be at liberty to cancel the charter, is generally used in trades which depend on a particular season, so that the insertion of the clause is really a sort of announcement that an arrival after the day named will frustrate the objects of the charter, and so “put an end in a commercial sense to the speculation entered upon by the shipowner and charterer.” This being so, supposing that a ship which sets sail for the loading port in that which apart from accident would be abundance of time is detained by some peril until after the time designated, and loses the charter in consequence, it might well be argued, by analogy with the decision in *Jackson v. The Union*, that the underwriter on freight, supposing the policy to cover the voyage on which the accident occurs, should be liable for a total loss. If in such a case the jury were to find, as they probably would, that the delay necessarily resulting from sea-peril put an end in a commercial sense to the adventure, the only distinction between the case here supposed and *Jackson v. The Union* would be that the underwriter might here perhaps plead that the cancelling clause was something

(*w*) § 186, n. (*b*).

which ought not to affect him, as he was ignorant of its existence when he signed the policy. This however would probably be of no avail, since one who insures chartered freight has notice of a charter-party, and might have learnt its terms if he had inquired (x); besides which, in certain trades, the existence of a cancelling clause in charters is ordinary, and matter of notoriety; and further, it might be said, it is not the cancelling clause as such, but the frustration in a commercial sense of the purposes of the voyage,—of which the cancelling clause is simply the definition,—that occasions the loss of freight.

II.—ABANDONMENT.

In what cases Notice of Abandonment must be given.

§ 242.—When a total loss, whether actual or constructive, has taken place, the insurer is to pay the sum insured or insurable, as defined in the First Chapter, and is, on the other, hand, entitled to whatever may be recovered, the assured abandoning to him all his property in the thing insured, or what may remain of it, or what may accrue as an incident of ownership. Such abandonment is implied as accompanying every settlement of a claim for total loss. It is unnecessary to stipulate for it; it passes without a word spoken; for it is a necessary incident of every contract not only of insurance but of indemnity. This abandonment takes place at the time of the settlement of the claim; it need not take place before (y).

This cession or abandonment which accompanies a settlement gives to the insurers a right to all the advantages, direct and indirect, of ownership of the thing insured. Not only may they take possession of, sell, or otherwise dispose of, the wreck or remains; but if the

(x) See *Allison v. Bristol Mar. Ins. Co.*, 1 Ap. Ca. 209.

(y) *Per Brett, L.J.*, in *Kaltenbach*

v. Mackenzie, 3 C. P. D. 467, at 471; and see *Rankin v. Potter*, L.

R. 6 H. L. 83, at 106.

assured is entitled, in virtue of the ownership he had before, to any rights of action or recovery from third parties, as for a contribution to general average (z), recovery of damages against the wrongdoer in a collision suit, or the like, these rights pass by the abandonment to the underwriter. This is so, even should the result be that the underwriter is on the whole a gainer by the transaction; as, if the actual value of a ship recaptured, or unexpectedly arriving when paid for as lost, or the sum recovered as its value from a wrongdoer, or the proceeds of goods necessarily sold at an intermediate port, happen to be more than the value in the policy which the insurer has paid (a). The transfer of ownership made by an abandonment of this kind is complete and irrevocable, when once the loss has been settled.

§ 243.—The notice of abandonment is a totally different thing (b). The requiring of this notice in certain cases seems to be a peculiarity of the law of insurance. "I am not aware," says Brett, L.J., "that in any contract of indemnity, except in the case of contracts of marine insurance, a notice of abandonment is required. In the case of marine insurance, where the loss is an actual total loss, no notice of abandonment is necessary; but in the case of a constructive total loss it is necessary, unless it be excused (c).

§ 244.—Of the origin and motives which have led, from very early times, to the requiring a notice of abandonment, various and not always consistent explanations have been given. I will lay before the reader one of the latest, from the judgment of Cotton, L.J., in the case just referred to. "A constructive total loss," says the learned judge, "is when the damage is of such a character that

(z) *Dickinson v. Jardine*, L. R. 3 C. P. 639, at 643.

(a) *North of England Iron S. S. Co. v. Armstrong*, L. R. 5 Q. B. 244; *Burnand v. Rodocanachi*, 5 C. P. D. 424.

(b) See *per* Blackburn, J., in *Rankin v. Potter*, L. R. 6 H. L. 83, at 118.

(c) *Kaltenbach v. Mackenzie*, 3 C. P. D. 467, at 471.

the assured is entitled, if he thinks fit, to treat it as a total loss. When . . . the assured elects to treat the loss as a total loss, he is bound to transfer to the underwriters the subject-matter insured. The general rule is, that he must, as soon as he has the information which enables him to make his election, give notice to the underwriters that he has so elected. That rule is founded upon two grounds: when the assured has once elected to treat the loss as a total loss, the underwriters can insist upon his abiding by the election, so as to enable them to take the benefit of any advantage which may arise from the thing insured. Therefore the object of notice, which is entirely different from abandonment, is, that he may tell the underwriters at once what he has done, and not keep it secret in his mind, to see if there will be a change of circumstances. There is another reason: the thing in various ways may be profitably dealt with, as the ship was in this case. Therefore, the second reason for requiring notice of abandonment to be given to the underwriters is, that they may do, if they think fit, what in their opinion is best, and make the most they can out of that which is abandoned to them as the consequence of the election which the assured has come to" (d).

§ 245.—Notice of abandonment, then, is only requisite in cases of constructive, as distinguished from actual, total loss. This again is more precisely defined by saying that notice is only requisite in cases in which the assured is "*entitled* to treat the loss as total," or has a right of election whether to do so or not. A right of election here supposes two conditions: the facts must be such as would induce a prudent owner if uninsured to treat the loss as total,—this gives the right affirmatively so to treat it; and there must be some property, or some chance at least of property, still remaining in existence,—this gives negatively the right to refuse so to treat it; for no man is

(d) *Kallenbach v. Mackenzie*, 3 C. P. D. 467, at 479.

bound to abandon his property to his insurer (e),—he may always, if he pleases, retain his property, and claim for partial loss only. Wherever these two conditions are found, the right of election here spoken of, and the consequent obligation to give notice of abandonment, must, it is conceived, exist.

§ 246.—This right of electing, whether to treat a loss as total or not so to treat it, can never be anything more than the sort of right a man has to act wantonly or capriciously, without regard to his true interest. A prudent uninsured owner, *as such*, can have no right of election; for one course or other, to repair or abandon, must always be the more to his advantage, and that course is prudentially necessary, and the very basis of the law concerning constructive total loss is that it is financially impossible, or impossible for a man without ceasing to be prudent, to adopt the other course. When this is clearly understood, it seems hardly possible to lay down any rule of distinction between that which is violently or ridiculously, and that which is moderately, imprudent; so as to say for example that if the repair will cost £1050, and the ship, on her utmost valuation, will then be worth £1000, notice of abandonment must be given, because perhaps the owner might elect to repair; while, on the other hand, if goods insured for £1000 have been necessarily sold at an intermediate port for £50, notice of abandonment is not requisite, because no man in his senses would elect to keep £50 rather than claim £1000 from his underwriter. It seems, at all events, the safer doctrine that in both cases,—that is, wherever there is in existence anything to abandon, and anything as to which a fool or a madman might exercise an option, a notice of abandonment, or something equivalent to it, ought to be given (f).

(e) *Lohre v. Aitchison*, 2 Q. B. D. 501, at 507.

(f) Dicta, no doubt, and those

of the greatest weight, might be cited against this. It has been urged in the strongest language

§ 247.—Such, after some fluctuation, appears to be at present the rule of English law. A notice of abandonment need not be given where there is nothing to abandon: there is nothing to abandon if at no point of time the assured has had an option or opportunity of making an election between two possible courses: this election, however, is not necessarily an election between two courses equally advantageous, or the advantages of which are somewhat evenly balanced, but may be an election as to which no one in his senses would hesitate. And, where an election in this sense is possible, notice of abandonment should at once be given, notwithstanding it may happen that the notice can be of no possible service or advantage to the underwriter. Lastly, an election in this sense is always

that a notice of abandonment cannot be requisite where the giving of it would be an idle formality. Thus, in *Rankin v. Potter*, Lord Chelmsford rests his judgment on two grounds of principle; first, that in the case before him there was nothing in existence, no property, and no right springing out of property, which could be abandoned to the underwriter; and secondly, at least by implication, that “notice is only necessary to be given where upon receiving it the underwriters could do something in the exercise of their rights over the salvage.” This last, he says, “seems to place the rule as to abandonment on a reasonable foundation. No prejudice can possibly arise to the underwriters where it is wholly out of their power to take any steps to improve or alter their position.” (L. R. 6 H. L. 83, at 157.) And the other Lords who took part in the judgment said what amounted to the same thing. Lord Colonsay put it in the form of a question: “What was to be

gained, then, by the notice of abandonment being given?” (p. 161). And Lord Hatherley, commenting on the argument of counsel, to the effect that notice of abandonment ought to be given irrespectively of any advantage which the insurers might possibly derive from it, said: “I apprehend that certainly no authority has been cited to show that this notice of abandonment is to be considered necessary in cases where no such advantage could possibly accrue to the underwriters” (p. 165). But, weighty as these expressions of opinion undoubtedly are, they do not amount to principles treated by the House of Lords as the basis of their decision, for the true and sufficient basis of the decision was the first ground, viz., that there existed in the case they were trying no property, or thing, or right that could be abandoned. And, regarded simply as dicta, they must of course be considered in conjunction with the decision of the Court of Appeal in *Kaltenbach v. Mackenzie* (3 C. P. D. 467).

possible where there remains in existence any part of the property or thing insured, or any pecuniary right springing out of its existence ; for the assured may always elect to retain his property in preference to claiming on the footing of a total loss (*g*).

§ 248.—It is to be observed, however, that the mere act of claiming a total loss from the underwriter is equivalent to a notice of, for it implies, an abandonment ; and therefore, if such claim is made at the earliest practicable time after receipt of advices of the loss, it may well be that no other or former notice of abandonment is in such case requisite.

At what Time the Notice should be Given.

§ 249.—The time at which the notice of abandonment is to be given is a matter of the first importance. The proper time for giving it is, as we learn from the judgment of Cotton, L.J., above quoted (*h*), “as soon as” the assured “has the information which enables him to make his election.” He certainly cannot give effectual notice of abandonment until he has received fairly authentic or credible information of a state of facts such as entitles

(*g*) The leading cases on this subject are, *Roux v. Salvador*, 3 Bing. N. C. 266 ; *Knight v. Faith*, 15 Q. B. 649 ; *Rankin v. Potter*, L. R. 6 H. L. 83 ; and *Kaltenbach v. Mackenzie*, 3 C. P. D. 467. The result may be roughly summed up as follows :—In *Roux v. Salvador*, Lord Abinger laid it down that notice of abandonment was never requisite but when the giving it might possibly be of service to the underwriters. In *Knight v. Faith*, Lord Campbell held that whenever the subject-matter insured remains *in specie*, though in a damaged state, a notice of abandonment must be given, not merely to enable the underwriters to make the most of

the proceeds, but likewise to give them the means of inquiry and of guarding against fraud (see p. 659). *Rankin v. Potter* establishes that where neither property, nor right founded on property, exists so as to be transferable to the underwriters, no notice of abandonment need be given. Lastly, *Kaltenbach v. Mackenzie* determines that where such property does exist, although under circumstances such that the underwriters could do nothing after abandonment to diminish or alter their loss, notice must be given. Here we have a series which may plausibly be described either as a process of gradual specification or a seesaw.

(*h*) *Ante*, § 244.

him to treat the loss as total ; and he must not delay the notice after that time, longer than is reasonably necessary for making up his mind what course he will take. This rule, however, simple as it is in theory, is by no means always easy of application. The knowledge of the facts, especially when it comes by telegraph, usually comes upon the owner by degrees, and it may not be easy to determine at what precise point the decisive piece of intelligence, which warrants and necessitates the notice of abandonment, reaches him.

§ 250.—It may be convenient to classify the several cases which arise in practice in the following manner :— Either the action to be taken with regard to the disposal of the property is to be taken by the assured himself, that is to say, by the owner of the goods or the ship, or it has been already taken for him by the captain, acting as the agent of necessity when there is no time for consulting the principal. In the first of these two cases, a further subdivision is to be made : the conditions which must determine the election either are known and definite, or they depend on the chances as to some future event at present uncertain.

§ 251.—First, then, of the case where action is to be taken by the assured himself, and where the conditions which should determine it are definite and can be known. This may be either as to cargo or as to the ship.

For cargo.

As to cargo, the only case which need here be discussed is that in which it is a question of abandoning the cargo, when this is at an intermediate port, and the practicability of carrying it to its destination is doubted. Before abandoning, the assured must be in possession of information sufficient to found a reasonable belief that it is impossible, or not worth while, according to the tests already pointed out, to have the cargo sent on to its destination, in the same or any other vessel. He is entitled, and indeed bound, to wait for information sufficient for this purpose ; that is to say, for such information as he would

reasonably wait or ask for, were he uninsured. There may be cases in which the owner of the goods may be justified in asking and waiting for surveyors' reports as to the actual condition of the goods, estimates of the cost of forwarding, or other such particulars. But so soon as the information which he has received, though it be far short of technical or legal proof, is sufficient to make it clear to his mind what course it would be best for him to pursue were he uninsured, he ought to make his election, and, if he elects not to forward, to give his notice of abandonment at once. He must on no account lie by to watch the changes and chances of the market, otherwise his right to abandon is gone (*i*).

§ 252.—The same principle should regulate the conduct of a shipowner, whose ship is in a place of safety, but so damaged as to make it questionable whether she is worth repairing. Before abandoning, the assured must have a sufficient ground for doing so; that is, information, such as a prudent man would trust and act on were he uninsured, as to the extent of damage suffered by the ship, and the probable cost of repairing it. Till these two matters are known with some accuracy, it is impossible to determine prudently whether to repair or not. A delay for surveys and estimates, sometimes even for absolute tenders for repairs by a responsible shipwright, in which all unascertained damage shall be included, may in some cases be not only justifiable but necessary before abandoning, especially if the probable cost of repair comes very close to the value of the ship when repaired. But no delay for these purposes can be permitted, when the information already received, though imperfect, is such as would suffice to determine the conduct of a prudent owner if uninsured (*j*).

(*i*) *Gernon v. Roy. Exch. Ass. Co.*, 599; and *Rankin v. Potter*, L. R. 6 Taunt. 381, at 387; and see *Stringer v. English & Scottish Ins. Co.*, L. R. 4 Q. B. 676, 5 Q. B. 599; and *Rankin v. Potter*, L. R. 6 H. L. 83, at 120.
(*j*) See *Currie v. Bombay Native Ins. Co.*, L. R. 3 P. C. 79.

When
result un-
certain.

§ 253.—The proper time to abandon is still harder to hit, when account has to be taken of the chances concerning matters future and uncertain. In the case, for example, of a ship stranded or sunk, the question whether to go to expense in the attempt to float her may involve several uncertainties: it may be doubtful whether the attempt will succeed, how much it will cost, how badly the ship is or will be damaged before she is got off, and whether, after all, she will be worth the two expenses of getting her off and repairing: besides which, the question what is to be done may be complicated by there being cargo on board, which it may be the shipowner's duty to save.

§ 254.—Let us begin by clearing away this last complication, as to the cargo; since, when there is cargo on board a ship stranded or sunk, the question as to saving the property as a whole, or so much of it as can be saved, must take precedence of the question as to abandoning the ship to the insurers. The first thing to be considered is, whether the ship and cargo may best be saved conjointly or separately. If the best or only way is to save them conjointly, as by going to expense in heaving off or lifting the laden ship, then the question will be whether, taking account of the estimated expense, chances of failure, and probable value of the entire property when saved, the undertaking will be prudent, or such as a reasonable man would venture on were the whole property his own and uninsured. If, on the best judgment that can be formed at the time, it would be prudent to incur the expense, that course should be taken; in which case the owner of the cargo and the underwriters on the ship and freight will be liable for their due shares of the expense, whether the undertaking be successful or not (*k*). If not, the time has come to give notice of

(*k*) The representatives of the cargo should in general be consulted, if practicable, at least by

way of precaution, in case there should be a fair room for doubt as to the propriety of an undertaking

abandonment to the respective underwriters, who possibly may be more venturesome, and at all events are entitled to have the option of running the risk. If, on the other hand, the state of things is such that the property can most advantageously be saved piecemeal or by degrees, as by first taking out the ship's stores and the cargo, and then floating the hull thus lightened, then in the great majority of cases, if not invariably, the question as to abandoning the ship should be postponed until the cargo has been placed in safety; and this for two reasons: first, because if the underwriters accept the abandonment and take possession of the ship, the process of saving the cargo may be interfered with, and the shipowner may in consequence incur liabilities towards the owners of the cargo; and secondly, because the chances of saving the ship may in general be more accurately estimated after the cargo is out than before it. This general rule, however, is of course subject to exceptions: should the impossibility of saving the ship be clear from the outset, it may be necessary to give notice of abandonment earlier.

§ 255.—When this complication as to the cargo has been got rid of, the course to be taken by a shipowner with regard to abandonment becomes clear. In principle, all that is to be done is to estimate the money-value of the chance of failure to float the ship, and then the conditions of the calculation are, on one side, so much probable outlay, and on the other, a given chance of saving a ship problematically worth so much. If the latter outweighs the former, the attempt should be made; if not, the point has been reached at which the owner should without delay give his notice of abandonment.

which may fail. But, should some of them unreasonably refuse, it cannot be said that the shipowner, who as carrier is responsible for the due care of the cargo during the transit, would be justified in desisting from an attempt to save the whole, if in

his judgment such an attempt would be prudent. If so, he would be entitled, it is conceived, to recover the due proportion of the expense, in case of failure, even from those owners of the cargo who have refused to authorize the undertaking.

Sale by
captain.

§ 256.—Thus far we have been speaking of cases in which the course to be taken with regard to the saving or disposing of the property is left to be determined by the assured himself. We are now to consider those in which it has been already determined for him by the independent act of the shipmaster when beyond reach of communication with his principals. This case, owing to the general use of telegraphs, is of course much rarer than formerly. The rule applicable to it, so far as can be gathered from the decisions of our Courts up to the present time, appears to be this: that if, at the same time when the assured first hears of the casualty which occasions a total loss, he likewise hears that his property has been sold by the master of the ship, his duty, if there can be the least doubt as to the propriety of the sale, is immediately to give notice of abandonment; and, even should there be no doubt on the subject, it is his safest course to do so, because he has the possible right of election to retain the proceeds; though in the latter case it cannot be so confidently affirmed that he is bound to give notice as in the former. The right of the master to sell either ship or cargo is strictly limited to the case of necessity: and by "necessity" is here to be understood such a state of things as admits of no alternative but either to sell or leave the thing to perish. Such a state of necessity may indeed arise, notwithstanding that the property may be eventually saved by the purchaser, and this at an expense considerably below its value. The state of things at the time when the master resolves to sell is what is to be considered. If the ship and cargo are in a position of danger, from which they can only be rescued by incurring certain expense, and if the captain, taking the best advice within his reach, and forming the best judgment he can, honestly and judiciously believes that it is better not to incur the risk and expense, and if, moreover, there is no time for delay to consult the owners, but he must either sell at once or leave the property to

perish, such a sale is justifiable, and will give a good title to the purchaser, notwithstanding that the latter may run the risk, incur the expense, and make a large profit by the transaction. But such sales by a shipmaster are always watched with suspicion. A sale made without necessity is null and void. The underwriters therefore ought always, where there is any possibility of impugning the sale, to have the earliest opportunity of at least instituting enquiries on the subject; which opportunity there is no better way of giving them, than by insisting on the necessity of an immediate abandonment. In these cases therefore the severer view of the doctrine of abandonment is probably on the whole the most useful, and is likely to be supported by the Courts. There is really no hardship in it on the assured, when the rule is once understood (l).

Effect of Notice of Abandonment.

§ 257.—If the assured abandons, he must abandon the whole thing insured: he is not at liberty to pick and choose, abandon some part and take to the remainder. But the *whole* here intended must, it is conceived, be the same whole which can be the subject of a total loss as

(l) There is a passage in the judgment of Brett, L.J., in *Kaltenbach v. Mackenzie*, 3 C. P. D. 467, which shows that a notice to abandon is certainly prudent, if not necessary, in all such cases: "I am not prepared to say," he says, "that if it could be shown that the subject-matter of insurance, at the time when the assured has information upon which otherwise he would be bound to act, is in such a condition that it would absolutely perish and disappear, before notice could be received or any answer returned, that that might not excuse the assured from giving notice of abandonment; but I am prepared to

say that nothing short of that would excuse him; and although I do not say what I have stated would excuse him, I am not prepared to say it would not. That is the limit to which I think the doctrine could be carried, and it seems to me that to go further than that would let in the danger, to provide against which the doctrine of notice of abandonment was introduced into the contract and made a part of the contract" (at p. 475).

See, however, *Idle v. Royal Exch. Co.*, 8 Taunt. 755, and *Mount v. Harrison*, 4 Bing. 388; but these cases can hardly be relied on in the face of more recent decisions.

L

explained above: that is, if two commodities of different kind are insured in the same policy, the assured may abandon one of them and retain the other.

Notice in writing.

§ 258.—A notice of abandonment should be clear, unambiguous, and unconditional. To prevent mistake, it is better it should be in writing, though this is not essential. And, for the same reason, it is advisable, yet not obligatory, to use in the notice the technical word "abandon," the force of which is well understood (m).

Effect of giving no notice.

§ 259.—If, whether designedly, or through inadvertence, neglect, or ignorance of the law, the assured has not given a notice of abandonment when he ought to have done so, his right to claim a total loss is gone. All that he can do in such a case is, first to act as he thinks best with regard to the disposal of his property, and then to claim under his policy on the footing of a particular average. He may, for example, sell his ship, and then claim, not the difference between the proceeds and the policy value, but a not larger sum based on the estimated cost of repairing with the usual deductions. This he is entitled to, notwithstanding that the repairs have not been actually effected (n).

Duty of underwriter.

§ 260.—When notice of abandonment has been given, the underwriter, if he means to accept it, should do so at once. If he returns no answer, it is now settled that he must be taken to have declined to accept (o).

The effect of his declining is merely that the assured is left to make out his title to recover a total loss in due time. Strictly speaking, he is probably entitled forthwith to claim the sum insured, provided he is in a position to prove the loss total, leaving the underwriters to dispose of the wreck; but in practice this is rarely done. The assured may, if the abandonment is declined and no special instructions given by the underwriters, at once

(m) See *Currie v. Bombay Native Ins. Co.*, L. R. 3 C. P. 72.

649.

(n) *Knight v. Faith*, 15 Q. B.

(o) *Provincial Ins. Co. of Canada v. Leduc*, L. R. 6 P. C. 224, at 237.

proceed to take the proper steps for the disposal of the property; in doing which he is regarded in law as the agent of the underwriters, and therefore, like any other agent, responsible to them for using reasonable judgment and diligence in his agency (*p*).

§ 261.—Supposing the underwriter accepts the abandonment, he thereupon becomes liable to pay the sum insured, and has the property to deal with as he pleases. Such a settlement, in the absence of fraud or undue concealment or misrepresentation on the part of the assured, is conclusive, and cannot be opened on account of a subsequent change of circumstances. Thus if a ship is captured, and the loss thereupon paid, her subsequent recapture does not entitle the underwriter to claim a refund; the ship remains his property; though if the recapture had taken place after notice but before acceptance of abandonment, and before the issuing of a writ (*q*), the assured would have lost his right to claim a total loss. Effect of acceptance.

§ 262.—An underwriter who wishes not to accept an abandonment, and yet to take steps for the recovery or disposal of the property, is placed in a difficult position, since it is hardly possible for him to adopt active measures of any kind for the purpose, without drawing upon himself a species of ownership, from which an acceptance of the abandonment may be implied. To meet this difficulty, it is now very usual to insert in policies what is called the "waiver" clause,—an authority for either party to act in the saving of the thing insured without its being deemed an acceptance or waiver of abandonment. This clause may occasionally be serviceable to the assured likewise, as obviating any inference that might be drawn from his The waiver clause.

(*p*) See *per* Blackburn, J., in *Stringer v. Engl. & Scott. Mar. Ins. Co.*, L. R. 4 Q. B. 676, at 686; *Roux v. Salvador*, 3 Bing. N. C. 266, at 287; and *per* Willes, J., in *Potter v. Rankin*, L. R. 3 C. P. 562,

at 573.

(*q*) The issuing of a writ has the effect of drawing an imaginary line at that date, so that all facts which happen subsequently are ignored.

conduct, to the effect that in the disposal of the property he was acting, not as agent for the underwriters, but on his own behalf.

Abandonment of ship transfers freight.

§ 263.—An abandonment has the effect of a transfer of the thing insured, with all rights and incidents appertaining to it, from the assured to the underwriter. This transfer takes effect, not from the time of the abandonment, but from that of the accident which justified it (r).

The abandonment of the ship, it has been decided, carries with it the ship's earnings from the date of the accident. The freight, as a consequence of the rule of English law which recognizes no *pro rata* freight or proportionate freight for a partial carriage, is treated as earned by the performance of the final stage in the carriage only. It follows that if the ship arrives and earns her freight, and is then abandoned to the underwriters as not worth repairing on account of damage suffered in the voyage, the underwriters on the ship are entitled to the freight. Yet, since the freight has in fact been earned, and is lost to the owner, not by any peril insured against, but by reason of the abandonment to the underwriters on ship,—a matter with which the underwriters on freight have nothing to do,—it has been decided in the House of Lords that there is in such a case no liability on the part of the underwriters on freight (s). Thus, between the two, the shipowner loses his freight without compensation.

(r) *Stewart v. Greenock Mar. Ins. Co.*, 2 H. L. Ca. 159; *Scottish Mar. Ins. Co. v. Turner*, 1 McQueen's Sc. Ap. 342.

(s) *Scottish Mar. Ins. Co. v. Turner*, 1 McQueen's Sc. Ap. 342. This decision has been much questioned; see *per* Willes, J., in *Potter v. Rankin* (L. R. 3 C. P. 562, at 570—571), *per* Cockburn, C.J., in the same case on appeal (L. R. 5 C. P., at 374), and *per* Brett, J., before the Lords in *Rankin v. Potter*, L.

R. 6 H. L. 83, at 100: and it may possibly be argued that the principle laid down by the House of Lords in this last case is really fatal to it. That seems a doubtful point; but in any case, for the reasons given in the text, it is not the non-liability of the underwriter on freight, but the right of the underwriter on ship to take the freight, which is contrary to the theoretical principles of insurance.

§ 264.—This rule only applies to freight earned under a contract, and earned by the ship herself. If the cargo belongs to the shipowner, the underwriter is entitled, not to freight for the entire voyage, but merely to an equitable compensation for the use of his ship, during the transit from the place where the accident occurred to the port of destination (*t*). And, if the ship is condemned at a port of refuge, and the freight is earned by means of transshipment, no freight can be claimed by the underwriters on the ship (*u*).

§ 265.—It is obvious that there is here something wrong. However convincing may be the arguments, taken separately, by which each of these decisions is supported, the results cannot stand together. It cannot be right that the shipowner should recover on the whole a larger sum if his ship is lost at sea than if she is lost to him by not being worth repairing. It cannot be right that the thing insured by a policy on ship should be for one purpose treated as excluding the freight, and for another as including it. If the ship's earnings under her contract are a part of the thing insured as ship, the shipowner ought not to be allowed to insure them a second time under the name of freight. If they are no part of that thing, the insurer of it ought not to be allowed to take them.

The truth is that the rule of law which gives the ship's earnings under her existing contracts, after abandonment, to the underwriter on the ship, is founded on a partial and confused apprehension of the fact, that the ship's value is constituted by her future earnings, of which that in actual process of being acquired is a portion. This subject has been considered at large in the first chapter of this volume. It was there pointed out that the right to insure freight as well as ship is only to be justified on the understanding that what is insured by the policy on ship is

(*t*) *Miller v. Woodfall*, 8 E. & B. 493.

(*u*) *Hickie v. Rodocanachi*, 28 L. J. (Exch.) 273.

merely a portion of the ship's real value to her owner (§ 22). The ship, as a machine for earning freight, has no other pecuniary value but the estimated aggregate of her future earnings. At any given time, the freight she is in process of earning is as much a portion of the ship's value as any of her future freights. It is convenient for practical purposes to make an artificial division between these two elements of the ship's value, the freight contracted for, and the freights which are still in the future. But this distinction, once made, should be carried out consistently. It should be understood that what is abandoned to the underwriter on ship can only be, that portion of the assured's interest which was originally the subject of insurance. To say that the freight is insurable by a separate policy because what is insured under the name of the ship is only the ship's value excluding this particular freight, and yet to say that because the ship is abandoned this particular freight is to form a part of that which was insured as ship, is hardly less unreasonable than it would be to say that the underwriters on the ship should upon abandonment be entitled to any cargo on board that might happen to belong to the shipowner.

However, the law on the subject appears to be absolutely settled. The only remedy practically within the reach of a shipowner is, to insert in his policies on ship some such clause as, "In case of abandonment, the underwriters on this policy undertake not to claim the freight."

Subject to
what
expenses.

Since the abandonment operates as a transfer of the ship and freight from the date of the accident, it follows that all expenses and liabilities incurred subsequently to that date, such as the wages of the crew, port charges at the place of destination, and the like, must fall on the underwriter. The crew from that date become his servants, and he must be liable for their faults, as for example in case of collision through improper navigation.

Abandon-
ment of
freight.

§ 266.—Thus far nothing has been said as to an abandonment of the freight. If the view taken in the earlier part of

this chapter as to the liability of an underwriter for the total loss of freight (*v*) is correct, it seems to follow that an abandonment to the underwriter on freight is in no case necessary; for there can, in no case for which he is liable for a total loss, be anything to abandon. I except only the obvious cases of a total loss by capture or for a missing ship; in which there must be an abandonment of the chance of recapture or unexpected arrival. In cases where the result is known, I can think of no possible salvage to the freight-underwriter. If any gain is to be made by transshipment, there is no total loss of freight (*w*). If freight is earned by repairing a ship after abandonment, that freight must belong to the underwriters on ship who have repaired her. Even where a ship stranded or sunk is abandoned to underwriters, and these succeed in floating her and earning freight, that freight must belong to them and not to the insurers of it.

(*v*) *Ante*, § 238.

(*w*) See, however, as against this the dicta of Brett, J., in *Rankin v. Potter*, L. R. 6 H. L. 83, at 102—

103, and of Cockburn, C.J., in *Potter v. Rankin*, L. R. 5 C. P., at 371.

CHAPTER VI.

PARTICULAR AVERAGE.

Definition.

§ 267.—PARTICULAR average is a portion of the indemnity furnished by insurance which it is in an especial manner necessary to fence off from the rest by exact boundaries, because insurance is frequently effected with exclusion of this portion, and in all policies the liability for particular average is subject to certain restrictions, which do not apply to claims of another kind.

One portion of the boundary-line has already been marked, in defining total loss: for particular average and total loss are mutually exclusive. On the other side, as will be seen more at large in the following chapter, neither a claim under the "sue and labour clause," nor a claim for contribution to general average as such, is particular average.

Thus particular average may be defined, loss or damage of the thing insured, not amounting to total loss, and not including the cost of measures taken for its preservation from a greater loss (*a*). The term total loss in this definition is to be understood throughout in the sense defined in the preceding chapter. No loss which is either actually or con-

(a) In *Kidston v. The Empire Mar. Ins. Co.*, L. R. 1 C. P. 535, the jury found that, by well-known usage, the term "particular average" denotes actual damage done to, or

loss of, part of the subject-matter of insurance, but does not include expenses incurred in recovering or preserving the subject-matter (at p. 538).

structively total, is particular average. As respects merchandise, the total loss of a portion only of any one distinct commodity insured is only a particular average. And so throughout; in defining the boundaries of the former, those of the latter are so far marked out at the same time (b).

(b) Concerning the origin of this word "average" there has been much unprofitable discussion. As a technical term of maritime law, the word is used in a sense entirely different from that which it has in ordinary discourse; and it is, perhaps, now scarcely possible to trace the series of analogies by which the sense has passed away, on either hand, from the derivative meaning, which latter indeed is itself still in dispute. Supposing the controversy as to the true origin of the word be considered as narrowed to the question, whether, as Mr. Mac-lachlan contends, it is a survival of the Latin *aversio*, or, as is suggested by some old Pisan and Florentine Ordinances, it is traceable to the Italian *avere*, the property or common stock; or, indeed, if we suppose both these theories to be erroneous, and the true root of the word not to have been yet determined; certain it is that, at some period anterior to its adoption as a term of modern maritime law, its meaning underwent a change, the precise nature of which can now only be a matter of speculation. Its first appearance on the stage of legal history, as a term possessing a fixed meaning, is its definition in the *Guidon de la Mer*, which is substantially repeated in the Ordonnance of Louis XIV. In this latter we have a formal definition, which was spread throughout Europe, being copied into most if not all of the maritime ordinances, which rapidly followed the Ordonnance in one Continental state after

another. As for our own law, we have seen that while we had insurance in practice, and no doubt a body of practical rules for it, from perhaps the 14th or 15th century, yet as a body of case law, or law recognized as such in the Courts, we go no further back, substantially, than to what Lord Mansfield imported through Valin and Emerigon from the Ordonnance of Louis XIV. There can be little doubt, therefore, than when the word "average" was first heard in English Courts of Law, it must have been understood in the sense defined in the Ordonnance, and that whatever changes it has since undergone—as some it undoubtedly has—must have been moulded on this original form. Now the words of the Ordonnance are:

"Toute despense extraordinaire qui se fera pour les navires et marchandises conjointement ou séparément, et tout dommage qui leur arrivera depuis leur charge et depart jusques à leur retour et decharge, seront reputes avaries. Les despenses extraordinaires pour le bâtiment seul, ou pour les marchandises seulement, et le dommage qui leur arrive en particulier, sont avaries simples et particulieres; et les despenses extraordinaires faites, et le dommage souffert pour le bien et salut commun des marchandises et du vaisseau, sont avaries grosses et communes. Les avaries simples seront supportées et payées par la chose qui aura souffert le dommage ou causé la despense, et les grosses ou communes tomberont

Particular average: on cargo.

We are to consider in the next place the precise nature of the indemnity given as particular average, and this must be done under three principal heads, as particular average on cargo, particular average on ship, and particular average on freight. The principles on which the three are calculated or adjusted lead to complications as to which one kind has little that is common to the others.

PARTICULAR AVERAGE ON CARGO.

Principle.

§ 268.—A claim for particular average on merchandize arises, either when a portion of some one commodity insured is wholly lost or destroyed, or is necessarily sold before reaching its original destination, or when merchandize which reaches its destination is reduced in value through being damaged by some peril insured against.

When part
totally lost.

§ 269.—The adjustment of the former of these cases presents no difficulty. The insurer is to pay the value in the policy of that portion which is totally lost or sold short of its destination, taking credit, in the latter case,

tant sur le vaisseau que sur les marchandises, et seront regalées sur le tout au sol la livre." (Ordonn. Tit. 7, Arts. 1—3, 4 Pard. 380. For the shorter definition in the *Guidon*, see my book on "General Average," p. 275, of 3rd edit.)

Thus we have the word average used as synonymous with every kind of loss or expense coming within the general term "accidents of navigation." This is the first meaning of the word that can be termed historical. Its later changes have all been narrowings, the natural result of a growing precision of legal definition. First, a division is made between total and

not-total losses, and then the word average is confined to the latter. Later, a division is made between claims in respect of the loss or injury of the subject-matter insured, and expenditures to prevent a greater loss; and then the word average is restricted to the former. The controversies which may be traced in the law-suits of the last twenty years show a gradual mutation, or perhaps a gradual specification, in the meaning attached to this only too flexible word. That the controversies are not over, and consequently the specification not yet complete, will be shown in the following chapter.

for the amount realized by the sale. The policy-value of any portion is, when the packages are not valued separately, determined from the policy-value of the whole, by a rule of proportion based on the relative invoice or market values of that portion and the whole. The invoice value is most ordinarily taken for this purpose, from analogy founded on the method of determining the amount of interest on an open policy. For the reason given in § 46, n. (t), this method is not correct in the case in which there has been, between the date of purchase and sailing or insuring, a rise in the market for some and not other of the commodities included in one invoice, or a higher rise on some than others.

§ 270.—When the claim is for damage to goods which reach their destination, a complication arises from the fluctuation of the market there, which renders it necessary to devise some means of separating the loss resulting from the sea-damage from the loss or gain attributable to a change in the market. Were the underwriter in such cases simply to pay the difference between the policy-value and the net proceeds, then, supposing the policy-value to represent (as in theory it ought) the amount of net proceeds as expected at the time of insuring, he would be paying, if the market fell in the meantime, the loss by sea-damage *plus* the loss by fall of market, and if it rose, the sea-damage *minus* the gain by its rise.

When goods
arrive,
but are
damaged.

To meet this difficulty, some third term must be taken into account; and this must be, the amount for which the goods would have been sold, had they been sound, on the day when the damaged goods were sold. The difference between these two represents the merchant's actual loss by sea-damage; and the per-centage which this loss gives on the sound value shows how much per cent. the goods are intrinsically damaged. Then we are to treat a depreciation of so much per cent. on the same footing as if that proportion or per-centage of the goods themselves had been destroyed; such a proportion of their value has in

fact been effaced : consequently, the underwriter is to pay that per-centage on the value in the policy.

Gross or
net pro-
ceeds.

§ 271.—Thus far, all are agreed that this is the true solution of our problem. The loss by sea-damage, and the loss or gain by a change in the market, are in this way perfectly separated from one another. But now arises a question, as to which opinions are still divided (*c*). Ought we, for the purpose of this comparison, to take the gross or the net proceeds of the sound and damaged goods ?

The difference between the two methods, which may be considerable, arises from this : the freight, and other ordinary charges to which the goods are subject at the port of discharge, are or may be the same in amount when the goods are damaged as when sound ; therefore, they always form a heavier per-centage on damaged than on sound goods ; and a comparison of net proceeds must, as a rule, show a heavier depreciation than one made on the gross (*d*).

§ 272.—Each of these methods is open to a strong objection to it, and the real question is, which of these is the stronger. If we adjust on the comparison of gross proceeds, we never, supposing the assured to have insured that amount which on true principles he ought to insure, fully indemnify him for his actual loss. If we adjust on the comparison of net proceeds, we never can make the fluctuations of the market wholly immaterial to the underwriter. On one side or the other, we fall short of that ideal perfection indicated in the Introduction : we have not a state of things in which the underwriter can disregard the market and the assured can disregard the perils of the seas. And

(*c*) "The subject of gross or net proceeds has, in spite of this unreversed decision," (*Lewis v. Rucker*), "remained a vexed question ever since. Each new generation of merchants coming to effect insurances stumbles at the same difficulty, and asks for a solution of it in nearly the same words." (*Hopkins*, "Handbook of Average," 3rd

edit., p. 241). The state of things could hardly be more graphically or accurately described.

(*d*) In exceptional cases it may be otherwise, as, when there is a refund of duty on damaged goods which happens to exceed the ratio of depreciation, but this is an accident, and occurs but seldom.

the reason why this ideal perfection cannot be perfectly attained has been already pointed out (e). All that can be done is to make the best approximation; and, when one of these two purposes of insurance must give way to the other, to let that give way which is the less important. That is the choice we have here to make.

§ 273.—As a matter of principle, it seems clear that the arguments in favour of the adjustment on net proceeds preponderate. The question really is, how much, or rather in what proportion, the thing insured is deteriorated. Now the thing insured is not the merchandize, but the interest of the assured in the merchandize. That interest, the expectation of gain which is the true thing insured, is, not the gross but the net proceeds. To say that it is the prime cost is merely to say, with somewhat less accuracy, the same thing. A merchant purchases goods and sends them over sea for no other reason, but because he hopes to sell them so that they shall bring in net as much as they have cost and something more. This calculation supposes that he has in his mind deducted the freight and charges, and taken account not of the gross but the net proceeds of their sale. Thus what he really insures is, a balance which is expected to remain after deducting certain fixed charges. In this respect his position is precisely analogous to that of a shipowner who insures a balance of freight expected to be due after the deduction of a lump sum prepaid: and as we know, on the authority of the House of Lords, that in such a case the ratio of depreciation is to be computed by deducting the amount prepaid from each side of the account (f), it is not easy to see why—apart from authority—a different rule should be applied in the case of merchandize. With regard to the argument on the other side, that an underwriter's liability ought not to be affected by a rise or fall of market, there is in it this fallacy: an underwriter, it is

(e) *Ante*, § 44, n. (o).

Ins. Co., L. R. 1 Ap. Ca. 209.

(f) *Allison v. The Bristol Mar.*

true, ought not to be liable for losses *occasioned* by a fall of market, but it is a very different thing to say that an underwriter's liability shall not be indirectly and incidentally affected by such a fall,—which is all that is here suggested. Under the system of adjustment by comparison of net proceeds, the direct and immediate cause of the assured's loss is a peril insured against, and the fall of market only comes into play remotely and incidentally. Incidentally, the rise and fall of markets continually and of necessity does affect the amount of an underwriter's liability, as for instance when he has to pay for new sails, and the price of canvas has gone up, and in a great variety of other such cases.

But it seems hardly worth while to argue the question at any length. As has been said, it is not so much a question between the absolutely right and the absolutely wrong, as between two methods of adjustment neither of which reaches the standard of theoretical perfection. The system of adjustment by gross proceeds, adopted on the authority of Lord Mansfield (*g*) and Lawrence, J. (*h*), has been in use in this country for about a hundred years, and has worked on the whole, in spite of complaints which are still heard occasionally, to the tolerable satisfaction of the mercantile public. If any merchant wishes for a more complete indemnity, he has the remedy in his own hands, by requiring the insertion of the clause "particular average to be adjusted by comparison of net proceeds;" and that this is so seldom asked for seems to prove that there is no great dissatisfaction with the system at present in use.

Practical Rules.

Practical
rules of ad-
justment.
The
auction.

The rules for adjusting particular average on merchandise are, then, as follow:—

§ 274.—When the goods insured, or any part of them,

(*g*) *Lewis v. Rucker*, 2 Burr.
1167.

(*h*) *Johnson v. Sheddon*, 2 East,
581.

reach their destination in a damaged state, the first thing the assured has to do is to provide for realizing the proceeds in such a manner as at once to obtain the best prices he can, and to be in a position to prove, in case of need, that he has done so. For this purpose, a sale by auction is most commonly resorted to. It cannot be laid down that this is absolutely necessary: there may be cases in which a sale of sea-damaged goods by private contract is clearly advisable; but this latter method being open to various abuses, care should in general be taken not to use it except either when there is mutual confidence between the assured and his underwriters, or when the assured is able to prove, or satisfy the underwriter, that such a sale will be to his advantage as compared with an auction.

§ 275.—In determining what goods are to be sold by auction, or, as it is not quite correctly called, “for account of underwriters,” the general rule is that nothing is to be thus sold except that portion which is actually damaged, or affected in its value by the damage. This may raise questions of some nicety. With regard to piece-goods, when the damage has not penetrated the entire bale or case, the most advantageous method usually is to separate the damaged pieces, and sell these only by auction, disposing of the remainder as sound. So when cotton or wool is damaged, it frequently is advisable to pick off the damaged portion, and confine the claim on the underwriters to the loss on that part only. Strictly speaking, it is the duty of the assured, in matters of this kind, to adopt such a course as he would as a matter of prudence follow, were he uninsured, in order to make the loss as light as possible.

§ 276.—The question then may arise, however, whether, after a separation of this kind has been made, supposing there is a loss in price on the sound portion of the package thus remaining, either because the broken portion of a package is less convenient for sale, or because of a sus-

Of loss by
breakage of
assortment.

picion in the mind of buyers that some taint of damage may remain, or because an assortment is broken, the underwriters are liable for this loss. Some of the older writers on insurance hold that they are not, on the ground that this loss is not a direct and necessary consequence of the perils insured against (*i*). The question was partially brought before the Court of Common Pleas, in a case where the attempt was made to claim from underwriters on a cargo of tea, not merely the damage to the chests of tea which had been touched by seawater, but also an alleged loss on the sale of chests belonging to the same chop or brand which were perfectly sound, by reason of a suspicion, acknowledged to be groundless, that the flavour of the sound tea might be affected by the presence of damaged tea in the same ship; and it was determined that such a suspicion did not warrant a claim on the underwriters (*j*). But the decision would probably have been the other way, had the suspicion been a reasonable one, or had there been fair room for doubt on the subject; and it certainly would have been the other way, had it been possible to prove any real change of flavour from the cause assigned. For, the remoter effects of sea-damage, such as a change of flavour in one portion of a cargo resulting from the wetting of another portion by seawater, are certainly recoverable from underwriters (*k*). And with regard to the breakage of an assortment, resulting from the damage to this or that article requisite for its completeness, there can be no reasonable doubt that this is a loss from which underwriters are liable; as, for example, if a machine consisting of several pieces which are packed separately is rendered useless by damage done to any one of the several packages. Bailey, in his "Perils of the Seas," points out a possible exception to this rule, in the case of an absurd or unusual kind of

(*i*) Stevens on Average, pp. 155
—158; Benecke, 437, 438.

Co. of New York, L. R. 8 C. P. 552.

(*k*) *Montoya v. London Ass. Co.*,

(*j*) *Cator v. Great Western Ins.*

6 Exch. 451.

assortment; as where two packages of boots or shoes are sent out, with all the right feet in one package and all the left in another. The consideration of this question may, however, be not unprofitably left until the case shall actually arise. Or, again, if the portion of a package, though composed of sound goods, is less saleable than an entire package for any other substantial and not merely fanciful reason,—as, for example, if the packages are to be sent on the backs of mules into the interior, and a package smaller than the ordinary size is really worth less because of the difficulty of balancing it for such transport,—it is not easy to see how such a loss can be described as anything else but a direct consequence of the peril which necessitated the breaking up of the original package.

§ 277.—The next step to be taken, when the damaged goods have been sold by auction, is to determine what those goods would have been worth in the same market had they been sound. Sound value.

Concerning this, care is to be taken that the conditions of the “sound value” shall be exactly equalized with those of the auction sale, otherwise a comparison of the two will not accurately define the damage. The dates must be the same, and so must be the terms of credit or the discounts for cash payment. Should it happen that the damage necessitates the selling at a different time from that intended, as, through the necessity either for a prompt sale to prevent increase of damage, or for delay in order to assort the damaged goods, any change of market in the interval is to be ignored, and the sound price taken at the date of the auction: whether this is to the advantage or detriment of the assured is fortune of war (*l*).

§ 278.—In calculating the sound value, account is of course to be taken of any change in the weight—or the measure, if the sale is by measure—of the damaged goods,

(*l*) *Lewis v. Rucker*, 2 Burr. 1167.

either by absorption of seawater, or by washing away or evaporation through heating. This is commonly done by taking the average weight of sound packages of the same mark.

§ 279.—When the proceeds and the sound value have thus been determined, the difference between the two gives the ratio of deterioration: and, as has been said, the underwriter is to pay this ratio or percentage on the policy-value.

§ 280.—In thus applying the ratio of depreciation to the policy, it is to be noted that, wherever there is a difference between the ratio of depreciation in two or more packages or lots, and likewise a difference in the proportion which the sound value of each bears to the policy-value, it is necessary to make the application of each such package or lot to the policy separately; for the result is not the same if they are lumped together.

§ 281.—In addition to the damage thus computed, the underwriters are to pay the extra charges or costs incurred in consequence of the damage and the claim; such as the fees of surveyors, charges of the auction, cost of adjustment, and the like. These are paid in full, without increase or reduction, whether the sound value be more or less than the value in the policy.

This may suffice, without entering into minute and wearisome details, to explain the method of adjusting a particular average on merchandize. Other complications must be pointed out, when we come to consider the effect of the "Memorandum," and its consequence, the "Average Clauses" (*m*).

(*m*) A short example of a particular average on merchandize is as follows:—

Sugar—1000 bags, policy-value	3000 <i>l</i> .
Sea-damaged 100 bags, value in proportion,	300 <i>l</i> .
900 sound bags weigh	2700 cwt.
100 bags should weigh in proportion	300 cwt.
Sound value 300 cwt. at 40 <i>s</i> . per cwt.	600 <i>l</i> .
Sale by auction 250 cwt. at 38 <i>s</i> . „	475
	<hr/>
	Loss 125 <i>l</i> .

PARTICULAR AVERAGE ON SHIP.

§ 282.—The adjustment of a particular average on ship has not the same kind of complication as one on cargo. No enquiry has to be made as to whether the actual value of the ship is greater or less than its value in the policy. The underwriters simply pay, each in the proportion that his subscription bears to the policy-value, the actual cost of the repairs, after excluding such as are due to mere wear and tear, with a deduction, the rate of which is fixed by custom, for the improvement supposed to result to the ship from having new work in place of old. Rules for wear and tear, and for this deduction, are thus the only matters requiring consideration when the ship has been duly repaired; when it has not, other questions arise.

Wear and Tear.

§ 283.—Wear and tear is distinguished from seaperil in not being occasioned by unusual violence or any accident, but by the mere “silent, natural, gradual action of the elements upon the vessel itself” (n). The chief seat of wear and tear is naturally that portion of the fabric which is directly used in urging the vessel through the water,—the sails, rigging, and lighter spars of a sailing vessel, and the screw-shaft of a steamer. Wear and tear must be discriminated from seadamage not so much by the kind of weather it occurs in as by the kind of damage done; what is ordinary weather for one season or voyage

If 600*l.* lose 125*l.*, 300*l.* should lose 62*l.* 10*s.*

Extra charges :—

Surveyor's fees . . . 3*l.* 3*s.*

Auction expenses . . . 9 10

12 13

12*l.* 13*s.*

Claim on policy 75*l.* 3*s.*

(n) *Merchants Trading Co. v. Universal Mar. Ins. Co.*, as cited in L. R. 9 Q. B. 596.

being storm for another, besides that the language of ship-masters varies greatly in intensity of epithet as descriptive of weather.

To distinguish what is wear and tear in particular cases must to a great extent be left to the trained judgment of experts in such matters. Some general rules for their guidance, however, are adopted in the practice of adjusters, which may be brought under the following heads :—

Sails split.

§ 284.—Sails split or blown away while set are ordinarily treated as wear and tear ; but not so, if set when the ship is aground, or if lost in connection with spars carried away, or if blown adrift when furled, or in the act of furling or setting them ; and a further exception ought probably to be made, in the case of sails split when the ship is lying to, or scudding before the wind, or when she broaches to. The ground of this rule is, that the mere pressure of the wind upon the sails while the ship is under canvas subjects them to an ordinary continuous strain, the effects of which are every now and then shown by their splitting or giving way.

*Rigging
and light
spars.*

§ 285.—Rigging chafed, stays or running gear parting, from no assignable cause beyond the continuous strain upon them, is for the same reason treated as wear and tear ; but not so if the cause of the breakage or chafing is something unusual and accidental, such as the carrying away of a mast, or the like. The same rule, with the same exception, is applicable to light spars, as studdingsail booms, royal and topgallant yards, and the like. What for this purpose are light spars, must be left to the judgment of experts. It seems hardly reasonable that the same rule should serve for small coasters, or yachts, which frequently lose their little spars by carrying on sail, and ships of the largest class, whose topgallant masts may be bigger than the others' topmast or even mainmast. Spars carried away when no sail is set on them are always admissible as particular average.

Screw

§ 286.—The breaking of a screw shaft, through mere

wear and tear, is perhaps one of the most ordinary dangers of steam navigation. It is supposed that by the constant revolution of the shaft some process of crystallization is set up, which by degrees renders the iron brittle, so that it may snap under the mere ordinary strain in fine weather; and this takes place, I am informed, at periods so varying for individual shafts that it is hardly, if at all, practicable to guard against it. Such a breakage, where there is no accident or violence to account for it, can, of course, only be treated as wear and tear. But there is a good deal of floating wreckage in the sea, and cases do occur in which the breakage of a shaft is not improbably attributed to contact with some such thing.

§ 287.—A ship's ground-tackle, windlass, and hawsers used for mooring, are of necessity subjected to much constant ordinary strain, or wear and tear. For this reason, the rule of practice formerly was to treat the breakage of a hawser, or parting of a chain cable, or breaking down of a windlass, as mere wear and tear, unless it could in some way be traced to an accident out of the common course, such as the falling of another ship athwart hawse, so as to bring a double strain upon it, or the like. Latterly, there has been a tendency to relax this strictness, particularly with regard to chain cables: a duly tested chain, it is argued, ought not to give way except under some extraordinary strain, so that its giving way is itself a proof, not that the chain was faulty, but the strain excessive. This leniency may perhaps in its turn be carried too far.

§ 288.—As for a ship's caulking,—if, without being struck by seas, thrown on her beam ends, or meeting with appreciable bad weather, a ship on a long voyage gradually becomes leaky, this is a suspicious symptom of wear and tear as affecting the hull. If, in such a case, it shall appear that the ship has not been caulked for a long time, the shipowner will probably have difficulty in establishing a claim on his insurers. But these are cases as to which

it is hardly possible to lay down a rule: the principle is, that before an underwriter can be made liable for the caulking, it must be shown that the leakiness has been occasioned by more than ordinary bad weather; and ordinary bad weather is a relative term, varying with the season and kind of voyage; and the application of this principle to individual cases can only be made with the aid of experts.

Metalling
clause.

§ 289.—A remarkable attempt has been made in recent times to solve this difficulty by violent means,—by drawing a hard and fast line through the middle of a ship, and declaring that leakiness above that line may be treated as particular average, but all below it, unless caused by grounding or contact with some foreign substance, shall be treated as wear and tear. Such, at least, is the practical effect of the clause called the “metalling clause,” so called because the line drawn is in most cases coincident with the line where the metal sheathing of a wooden ship ends. This clause is as follows: “free of particular average below water, unless caused by grounding or contact with some substance other than water.” Sometimes, instead of “below water,” the clause is “below the water line,” or “below the load water line;” the reason being that, when a ship is on her beam ends, or lying over under the pressure of her sails, a large portion of her side is not “below water,” and therefore does not fall under the exclusion of the first-named clause. The only thing to be said in favour of this clause is that it does sometimes protect an underwriter against unjust claims which it might otherwise be difficult for him to resist. A shipowner knows, however, that a policy with such a clause is worth very little to him. If underwriters would boldly resist claims for caulking ships in cases where there was good reason to believe that the need for it was due to wear and tear or to a neglect to renew the caulking or metal in due time, there would perhaps be no occasion for this over-stringent clause.

§ 290.—Damage done by the blow of a sea, as when a sea shipped carries away bulwarks, boats, deckhouses, or the like, frequent as such damage is, is in no case treated as wear and tear. Damage by the blow of a sea.

§ 291.—In those cases in which the loss is attributable to the conjoint operation of wear and tear and seaperil, an underwriter is liable for such losses as are directly caused by seaperil, though remotely by wear and tear. Damage from both causes conjointly.
Thus, if a rope supporting a mast gives way through wear and tear, and the mast breaks for want of this support, it is the storm directly and the breakage of the rope only remotely that breaks the mast. If a careless engineer neglects to keep the boiler duly supplied with water, and then the fire burns a hole in it, this is damage for which the insurer must pay (a). If a screw shaft breaks through mere wear and tear, and the broken piece drops into the sea and is lost with the propeller at the end, and water rushes in through the hole and the ship is sunk in shallow water and incurs expense and damage by the grounding, at what point does the liability of the insurer begin? It begins, apparently, so soon as we can find a distinct cause of loss, or something which might or might not have occurred subsequently to the wear and tear. In the case supposed, if we can say that by possibility the broken shaft might have been stopped from running out through its tunnel, then it was an accident that it was not stopped, in which case the underwriter must be liable for the loss of the propeller. If this cannot be said, at least the crew might by possibility have stopped the hole so as to prevent the vessel's sinking: then the not doing so, and therefore the sinking, was an accident, and the *causa proxima* of the damage.

§ 292.—Decay, or dry rot in timber, is really a species of wear and tear. A mast, that is more or less rotten, may be sprung in a gale either because it is rotten, or independently of its rottenness. In such a case, if the decay was

(a) See *W. India and Panama Ins. Co.* (Weekly Notes, 20 Nov. Tel. Co. v. *Home and Colonial Mar.*, 1880.)

so far advanced that the mast was not fit for the existing voyage, this would amount to unseaworthiness; if so far that, though fit for this voyage, the mast must be replaced at the end of it, then, if it is in fact replaced at the end of it, the springing has occasioned no loss to the owner, and there is therefore no claim on the insurer: but if the mast which would have lasted for the voyage is necessarily replaced at some earlier point because it has been sprung by seaperil, then the underwriter must pay for it: and it seems that the rule should be the same whether the mast would or would not have been sprung in the gale had it not been rotten,—for there is no warranty against any species of defect that falls short of unseaworthiness.

Deduction of One-third.

§ 293.—Secondly, we have to consider the customary deduction made in respect of the improvement of a ship by new work supplied in the place of old.

This deduction, by a very ancient usage not confined to this country, but almost universal wherever insurance is practised, is fixed at one-third. This deduction is made from the cost of repairs only, not from the incidental expenses, such as hire of a dry dock, cost of removals, cartages, use of stages, and the like. From chain-cables, one-sixth only is deducted, and anchors are subject to no deduction at all. Metal sheathing is placed on a distinct footing: the underwriters pay in full for the replacement of the weight stripped off, and the additional weight put on is borne by the owners. No deduction, of course, is made from temporary repairs, or repairs which for any reason have to be done over again.

§ 294.—These rules, which at best furnish a very rough measure of justice, were framed long ago, at a time when ships were small and built of wood. For wooden ships this practice has received the sanction of the Courts, but its applicability to iron ships has been doubted, and the point expressly reserved (o). It is very

(o) *Lidgett v. Secretan*, L. R. 6 C. P. 616, at 627.

likely, however, that the question, at least so far as particular average is concerned, will never come before the Courts; since there is, on the part of the owners of iron ships, so fixed a determination not to submit to this deduction, that the insertion of special clauses in policies, engaging to pay without deduction of thirds, is now almost universal. The truth is, to deduct one-third from the ironwork repair of the hulls of iron ships, or from iron masts or yards, on the plea of improvement, is a simple absurdity; since to patch new plates on old is rather a detriment than an improvement.

§ 295.—A question of some importance still remains undetermined. On what basis of cost or value ought this deduction of one-third to be computed? The improvement of a ship by the substitution of new work for old is the same, whether the new work has been supplied at a port where materials and labour are cheap or where these are costly. The deduction for improvement ought, then, to be the same in either case. It may easily happen, however, particularly when a ship is driven into a port of refuge to refit, that the cost of repairing is double or treble what it is at the home port. In such a case, ought the deduction for improvement to be more than it would have been, had the same repair been done at the home port? Clearly not, in theory, that is to say, on any grounds of good sense or fairness (*p*). At present, however, according to the practice of adjusters, one-third is deducted from the actual cost, however excessive that may be. It is likely that this practice has grown up through mere inadvertence, and is continued simply because it exists. It has not been sufficiently considered that the necessity for putting into a port of refuge, and therefore of repairing the ship at an inordinate cost, is a peril for the whole consequences of which the underwriters are liable, subject only to a reasonable deduction for the im-

(*p*) So decided in the Court of *Nueva Providencia*, see *Shipping Appeal of Rouen*, in the case of the *Gazette*, May 28, 1880.

provement which the ship may be supposed to receive. Nor, again, has it been sufficiently considered that it is contrary to public policy, and certainly to the true interest of underwriters in the long run, to encourage total losses by giving an inadequate compensation in the case of particular average.

§ 296.—The deduction of one-third ought not to be (*q*), but in our practice is, made from bottomry premiums, commissions, and the like incidental and proportionate expenses.

First
voyage.

§ 297.—No deduction for improvement is made from the repair of new ships,—that is, ships on their first voyage; and for this purpose a first voyage is taken to be one entire trading voyage out and home, however long or indirect that voyage may be. In the case where this rule was laid down by the Courts, the ship had sailed from London under charter to carry convicts to New South Wales, went thence in ballast to Madras, seeking a cargo, and was damaged on her way from Madras to London (*r*). Here there was an intention all through to work the ship's way back to her starting-point, and this in as direct a way as the chances of employment would allow. The decision would probably not be so far extended as to admit of an indefinite number of intermediate voyages, or to cover a ship which might go from port to port with no intention of returning to her starting-point. It is now usual, however, to insert in policies special clauses exempting the ship from the deduction, not for the first voyage, but for a stated length of time, as, for eighteen months for British and twelve months for colonial built ships from the date of launching or builder's certificate (*s*).

(*q*) There is, indeed, an American decision to the contrary; *Orrock v. Commonwealth Ins. Co.*, 21 Pickering, 456; Phill. Ins. § 1433; but this seems to go on a principle at variance with those laid down by later English decisions.

(*r*) *Pirie v. Steel*, 8 C. & P. 200.

(*s*) Suppose a ship, after being repaired, sails again and is wholly lost on the same voyage, ought the deduction of one-third to be made? It may be argued that the ship having never again come, for bene-

§ 298.—Suppose a ship not new to sail on a voyage with a new mast, and this mast to be carried away, the owner is not entitled to have the cost of a new mast supplied at the end of the voyage without deduction of a third (*t*). But if the ship puts back to her starting-point, and a new mast is put in there, no thirds, it is conceived, should be deducted; since in this case there is no gain to the owner whatever. For the same reason, in the case of an iron ship, where a plate is bent through seaperil, and the same plate is taken out, rerolled, and put back into the ship, no one-third should be deducted from the cost of rerolling, because there is no substitution of new for old.

§ 299.—The credit for old materials is deducted after the deduction of one-third from the cost of new. In America it is the other way. I venture to think the American rule demonstrably wrong. A new hawser is as much better than an old one, whether any of the old rope is left or not.

Rules for Adjustment.

§ 300.—The principle of a particular average on ship is, that the assured is to be indemnified for the damage done to the ship, or more properly the detriment suffered by the assured in respect of the ship, by the peril insured against. Of this damage or detriment, the cost of repairing, minus the improvement resulting therefrom, is in general, but not always or necessarily, the true measure. The repair must be made with reasonable economy, and

ficial purposes, into the hands of the assured, the deduction, which is in respect of benefit received, ought not to be made. This seems plainly reasonable, and is confirmed by the observations of Ashurst, J., in *Da Costa v. Newnham*, 2 T. R. 407, and is not contradicted by the American decision of *Humphreys v. Union Ins. Co.*, 3 Mason's Rep. 429, both cited in *Arn. Ins.*, p. 1000 of

2nd. edit. : though Mr. Bailly ("Perils of the Seas," p. 93) is perfectly correct in saying that the decision in *Da Costa v. Newnham* is not directly conclusive on the point. I differ with misgiving whenever I differ from Mr. Bailly, but on this subject I cannot think his reasoning conclusive.

(*t*) *Poingdestre v. Royal Exch. Ass. Co.*, Ryan & Mood. 378.

in a judicious manner (*u*) ; unless indeed it be a part of the disaster that the ship has been driven into at a place where economy and even honesty in repairing is unattainable by the assured or his servant the captain.

Loss of
time in
repairing.

§ 301.—In practice, no allowance is made for the ship's loss of time or employment whilst repairing, nor for the wages and maintenance of the crew necessarily retained at an intermediate port, nor for interest or commission on the shipowner's outlay. If indeed any of the crew are retained in order to work at the repair after the period when otherwise they would have been paid off, their wages whilst so retained must form part of the particular average.

Discounts.

§ 302.—The discounts allowed by tradesmen for prompt payment are of course to be deducted from the claim. The owner of the ship is not allowed in any way to derive a profit from the disaster, by making charges for his own services, or for those of persons in his permanent employ.

Repair
beyond
ship's
value.

§ 303.—A ship may be repaired at an expense exceeding her value, either because the extent of damage is not foreseen at the outset, or from the mere caprice or whim of the shipowner, who, not being bound to abandon, may repair if he pleases. In such a case, however, the underwriter is not liable beyond the amount of his subscription, this being the limit of his liability for loss to the thing insured resulting from a single accident (*v*). But if, during the term insured, two distinct accidents occur, and are repaired separately, there is nothing to prevent the underwriter from being liable, in the aggregate, to an amount exceeding the sum insured (*w*).

Repair by
substitution.

§ 304.—In repairing a ship, the cheapest or best way may sometimes be, to make an alteration or substitution, compensating, for example, broken timbers by extra knees

(*u*) *Stewart v. Steele*, 5 Scott's N. R. 927.

(*v*) *Lohre v. Aitchison*, 4 Ap. Ca. 755.

(*w*) *Le Cheminant v. Pearson*, 4 Taunt. 367, at 380 ; cited by Lord Blackburn, 4 Ap. Ca. 763.

or other fastenings. Where there is not honesty and skill, abuses of various kinds may no doubt result from such substitutions; a badly built ship may be, to a certain extent, reconstructed at the expense of the underwriters: therefore, these changes are to be watched with care. It cannot be doubted, however, that in many cases both parties are gainers from them.

§ 305.—Here it may be well to correct an erroneous notion that is sometimes troublesome in practice. A ship-owner, in cases such as the above, is apt to fancy that he is entitled, in strict right, to have his ship replaced precisely as she was before, and that in consenting to the cheaper method of repairing he is making a concession, for which he ought in some way to be rewarded. If, for example, the ship had hemp rigging before, and being dismasted, and wire rope being both better and cheaper, wire rope is put in, he would claim from the insurer the difference between the cost of wire and hemp.

§ 306.—In all such cases, and indeed in every case of repair by substitution, two questions only are to be put: would a prudent owner uninsured have repaired the ship in this way, and is the ship any, and if so, how much, the worse in consequence? The first question, we may suppose, must be answered in the affirmative; otherwise, why repair in that way? As to the second, it is to be borne in mind that by such substituted repair the ship may be as strong and durable and as good a carrier, and therefore as valuable to the owner while he keeps her, and yet not so saleable, as being unsightly, or as arousing undeserved suspicion. In such a case, some compensation is due to the shipowner; for he is entitled to have a ship which shall be as fit either to keep or sell as she was before.

§ 307.—Under the head of substituted repairs may be placed the engaging or sending out of special agents, overlookers or the like, not absolutely necessary, but thought to be useful for keeping down expense. These should be dealt with on the same principle.

Extra
expense for
despatch.

§ 308.—Suppose that extra expense is incurred in order to obtain special despatch in repairing, as, for instance, by working at night, is this claimable from the underwriter ? The underwriter objects that he never pays for loss of time, and therefore has no interest in such expenditure. The shipowner retorts, Your not paying for loss of time is an injustice which, at least, I should have the right to minimize. Here we come upon a real difficulty. The not paying for loss of time is a necessary consequence of an erroneous notion, which, however, is at present deeply rooted in the minds, not only of lawyers, but of shipowners themselves,—the notion, namely, that a ship, regarded as a mere structure of wood and iron, has a sort of value which is in some way separable from the value of her future earnings ; so that damage done to a ship, and loss of the ship's employment for a time, are two distinct things, and the insurance of the ship covers the former only, and not the latter. So long as this notion is prevalent, it would be premature to discuss the question whether an underwriter on ship ought to pay for the ship's loss of employment whilst repairing. In the meantime, the practical solution of the smaller question here put seems to be, that the shipowner is entitled to repair his ship in that manner which a prudent man would employ if uninsured : and, therefore, if the extra payment for despatch is no more than he would reasonably incur for his own sake apart from insurance, the underwriter should be liable for it.

When
repairs not
effected.

§ 309.—We are lastly to consider the liability of an underwriter in case the repairs, or some portion of them, are not effected at all. On principle, this circumstance ought not to affect the underwriter's liability, except in the case where that liability is merged in a liability for a total loss. If any part of the repairs have not been in fact made, and the ship is then totally lost under the same policy, it seems clear that the underwriter is only liable for the actual cost of what has been done, and the

policy-value of the ship (*x*). It is otherwise if the total loss takes place subsequently to the termination of the risk. Thus, where a ship insured by a time policy suffered damage which was only partially repaired, and was then totally lost at sea after the policy had expired, it was decided that the underwriters were liable for the entire particular average, bringing in the estimated cost of the repairs not executed (*y*). The state of things at the termination of the adventure or term insured is to be looked to; and at that time the ship was so much the less valuable, as she stood in need of those repairs. The circumstance that a different set of underwriters paid the full agreed value of the ship, in respect of the total loss, was immaterial.

§ 310.—If the repairs are not effected by the assured, because he chooses to sell the ship unrepaired, the underwriter is none the less liable. In such a case the assured really sustains the loss, in obtaining a smaller price for his ship. The underwriter therefore must pay, on estimates of the cost of repairing, so much as he would have been liable for had the assured repaired,—at all events, up to the amount of loss actually resulting from the sale. When ship sold unrepaired.

§ 311.—If, after the policy has expired, the ship has to be removed, for the purpose of repairing, from one dock or from one port to another, she moves at the risk of the assured, not of the underwriter; though, of course, at the underwriter's expense. Risk of removal for repair.

PARTICULAR AVERAGE ON FREIGHT.

§ 312.—From the propositions, which in theory seem indisputable, that the only thing insured by a policy on freight is the freight to be earned under a contract subsisting at or before the inception of the risk, and that

(*x*) *Livie v. Janson*, 12 East, 648, as explained in *Lidgett v. Secretan*, L. R. 6 C. P., at 620 and 625. (*y*) *Lidgett v. Secretan*, L. R. 6 C. P. 616.

particular average must be a partial loss or damage of the thing insured, it must follow that a particular average or freight can only arise when some portion of the cargo originally contracted for is by seaperil prevented from reaching its destination, so that the freight on it may be earned. If the ship is disabled, so that no part of the cargo can be carried to its destination by her, there may or may not be a *total* loss of freight, according as the cost of transport in another vessel is more or less than the original freight; but the cost of transport is in no case recoverable under the head of particular average (z). Nor, again, can a claim for particular average in any case arise from a delay before shipment such as puts an end to the adventure. The only ground for particular average on freight, then, is the disabling of a portion of the cargo for carriage to its destination (a). What constitutes such disabling has been considered in the chapter on total loss.

Rule for
adjust-
ment.

§ 313.—This being so, and the thing insured by a policy on freight being, as has been pointed out, the gross and not the net freight, the rule for adjusting a particular average on freight is simply this: it is first to be ascertained what proportion of the gross freight has been lost, —which is to be done by a comparison of the freight actually earned with that which would have been earned had there been no accident, and the underwriter is then to pay the same proportion of the agreed or insurable value.

§ 314.—In such a case, if other cargo is taken in to occupy the space left vacant by the disabled goods, it

(z) *Kidston v. Empire Mar. Ins. Co.*, L. R. 1 C. P. 535; 2 C. P. 357.

(a) Such disabling may of course result from damage to the ship, no less than of the cargo; as in the case when a ship is so damaged that she is unable to complete the voyage except in ballast-trim, carry-

ing on a portion only of her cargo. There may likewise be a partial loss of freight, under a time-charter, from the disabling of a ship during a portion of the time; as when, by the terms of the charter, no freight is due while the ship is laid up under repair.

seems clear that the underwriters are entitled to the benefit of this substituted freight. Here, where the loss is only partial, and a portion of the original cargo is carried on, there can be no question of the voyage being the same; and the new freight could not have been earned but for the accident; and, therefore, on the principles applicable to every contract of indemnity, the underwriters are entitled to this as a species of salvage (b). The amount thus earned should be simply deducted from the claim computed as above; for the new freight is in no proper sense a portion of the thing included in the policy-valuation (c).

§ 315.—Should any portion of the freight have been prepaid, that portion, for the reason already given, must be deducted on both sides of the account, in order to determine what proportion or per-centage of the freight at risk has been lost by sea-peril (d). Prepaid freight deducted on both sides.

§ 316.—With regard to freight improperly so called, namely, prepaid freight and the freight on goods belonging to the shipowner, these interests, as has been already pointed out, are merely enhancements of the value of the cargo, and any claim for particular average on them should be adjusted in the same manner as if the insurance were on cargo. Since, however, this almost self-evident truth is at present by no means universally recognized, the safest course for the assured in these cases is to combine his insurance on his goods with that on his freight, as by insuring "cargo including freight," or "cargo including advance-freight," as the case may be. Freight on shipowner's goods, or prepaid.

(b) *Ante*, § 233. See *Barber v. Fleming*, L. R. 5 Q. B., at 66; *Everth v. Smith*, 2 M. & S. 278; and *Barclay v. Stirling*, 5 M. & S. 6.

(c) Supposing the freight to be valued in the policy at a rate higher than the actual amount, as for instance, at 10 per cent. advance,

then it clearly would not be right to add such a 10 per cent. to the new freight credited, otherwise this mode of adjustment would operate as a penalty and a discouragement to the captain to fill the ship up by taking in new freight.

(d) *Ante*, § 235.

The Memorandum.

§ 317.—Some very important questions affecting particular average spring from the insertion of the clause at the foot of the policy, first introduced in the year 1745, commonly called The Memorandum. It is as follows: *N.B.—Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded; sugar, tobacco, hemp, flax, hides, and skins, are warranted free from average under five pounds per cent.; and all other goods, also the ship and freight, are warranted free from average under three pounds per cent., unless general, or the ship be stranded.*” There are variations of detail in many policies, and it is now very common to add the words “sunk or burnt” after “stranded.”

§ 318.—“Corn,” it has been decided, includes malt (e), peas, and beans (f), but not rice (g); and “salt” does not include saltpetre (h). In other words, neither the scientific nor the popular sense, but that usual in the trade, is to determine such points.

§ 319.—“Unless general or the ship be stranded,” has been construed to mean, “Except general, or unless the ship be stranded;” that is, underwriters are free from all average which is not general average, and they are liable for all average in case the ship be stranded,—no matter whether the stranding caused the damage or not (i). The damage may even have been discovered and repaired before the stranding takes place: a stranding, during the term insured, operates as a condition, and has the effect of effacing the remainder of the clause.

Stranding,
what is.

§ 320.—A ship is said to be “stranded,” for the present

(e) *Moody v. Surridge*, Park Ins.,
P. 245.

(f) *Mason v. Skurray*, *ib.*

(g) *Scott v. Bourdillon*, 2 B. & P.
213.

(h) *Journu v. Bourdieu*, Park,
Ins. 245.

(i) *Burnett v. Kensington*, 7 T.
R. 210.

purpose, when she is on the strand out of the common course of the voyage. *On* the strand implies a resting on it, not a mere striking and passing over. The *strand* is the ground or that which rests on the ground,—*e.g.*, piles driven into it, or the wreck of some other stranded ship. And it is no stranding to take the ground in the precise place and manner intended in the ordinary course of the navigation.

As to how long the ship is to rest on the ground, in order to be stranded, it cannot be said that there is any rule, except that she must stop long enough to be hard and fast aground, or so as to cease to be waterborne: if in motion, her way must be deadened. A stoppage long enough for a kedge to be carried out and the ship hove off, or for her engines to be reversed and the steamer backed off the shoal, would no doubt be enough. Bailly suggests that she ought to be so far on the ground that her centre of gravity should be resting on it, so that she shall be in no sense afloat; but this is perhaps too severe; in practice it is taken to suffice that she is fixed on the ground and motionless, though fixed only by one end. But to strike and pass on, or to have her motion retarded by the ground, yet to be always moving, is not enough (*ii*).

As for grounding in the ordinary course of navigation, as in a tidal river or harbour, or when placed alongside a dock wall to discharge cargo, though this itself is of course no stranding, yet a very little change of position, if resulting from an accident, will suffice to make it such. The breaking of a rope, or the mere stretching of it in a breeze, if it has the effect of tilting the vessel's bow off the bank she was lying on to a heap of stones or uneven ground not fit for lying on, has been held sufficient for the purpose (*j*). And even where the ship takes the ground in the place intended, yet if this intention be the result of

(*ii*) *McDougle v. Roy, Exch. Co.*, Ad. 20; *Bishop v. Pentland*, 7 B. & Cr. 219.
4 Camp. 283.

(*j*) *Wells v. Hopwood*, 3 B. &

an accident, so that the necessity for going there is out of the common course, as when a ship in distress runs into a tidal harbour for safety, there is little doubt this would be a stranding. Of course it is so, if the ship, being leaky, or on fire, or without anchors, is purposely run aground for her safety (*jj*). In short, "if the ground is taken under any extraordinary circumstances of time or place, by reason of some unusual or accidental occurrence" (*k*), this is a stranding.

Average
clauses.
4

§ 321.—In order to mitigate the severity of the memorandum in excluding damage under five or three per cent., it is usual to insert what are called "average clauses," the effect of which is to subdivide the subject-matter insured, for the purposes of this calculation, into smaller parcels, so as to give the assured a chance of recovery, in case this or that portion be seriously damaged whilst the bulk is sound. In insuring steamers, for instance, it is usual to value the hull and the machinery separately, with a clause, "average on each valuation [as if separately insured]." Sometimes the division is carried further, the "masts, spars, rigging, boats and materials," being valued separately from the hull. With merchandize the same end is attained by clauses such as "average payable on every ten bales of cotton, running landing numbers," or the like.

§ 322.—These clauses, being inserted for the benefit of the assured, are in no case to be used to his disadvantage; therefore the assured always has the option of claiming a loss which amounts to the requisite per-centage on the whole sum insured, notwithstanding that if broken up into smaller parcels, under the conditions of the average clause, some part of it might be excluded (*l*).

In distributing a cargo under series, regard must be had to the rule of law which treats each distinct com-

(*jj*) *De Mattos v. Saunders*, L. R. 7 C. P. 570. v. *Hopwood*, 3 B. & Ad. 20, at 34.
(*l*) *Hagedorn v. Whitmore*, 1 Stark. 157.
(*k*) *Per Lord Tenterden*, in *Wells*

modity as a separate whole,—as a something which can be totally lost, notwithstanding that the remainder is saved. One such commodity must not be run into the same series with another ; since, independently of any average clause, each distinct commodity is to be treated as if it were separately insured (*m*).

§ 323.—From the principle that the whole thing insured must be divided into series, it follows that, unless the number of packages insured is divisible without remainder by the number which constitutes the series, there must be a remainder, or “tail series.” The rule of practice, which seems to be fair enough, is that the underwriter is liable for the damage on this tail series should it amount to the required per-centage on the value of that series itself. If, for example, 105 bales of cotton are shipped, and the average clause is every ten bales, it suffices if the damage on the last five bales amounts to three per cent. on the value of those five.

§ 324.—With regard to the words “running landing numbers,” these words are in practice treated as referring to the order in which the bales are entered in the dock landing book. A practice prevails in some ports to enter the sound packages at the beginning of the book and the damaged ones at the end, working forwards and backwards till they meet somewhere in the middle. This, of course, is very much against the underwriters ; but where it is the custom of the port, they must submit to it.

(*m*) A similar precaution is of course to be observed if two distinct interests, or the properties of two separate persons, happen to be insured in the same policy.

CHAPTER VII.

OTHER LIABILITIES OF THE INSURER.

§ 325.—WE have now, in the chapters on Total Loss and Particular Average, dealt with every kind of loss or damage directly suffered through the perils insured against by the thing insured. What remains, in order to complete the account of an insurer's liabilities, may be brought under two principal heads: either they are, like total loss and average, liabilities under that engagement which forms the main and proper scope of the contract, namely, the indemnifying of the assured against loss sustained in respect of the subject-matter insured, or they are accessory or supplemental liabilities which the insurer takes upon himself by some clause added to the policy. We begin with the former kind.

Here, from the nature of the case, the subject of enquiry may at once be narrowed thus: since we have to do only with some loss which has relation to the thing insured, and some loss other than a loss or damage actually and directly done to that thing itself, our enquiry now must have reference to some loss or damage which the thing insured might have, but has not sustained, and which has yet resulted in some pecuniary loss on the part of the assured. In other words, we have to do with the cost of measures taken to prevent or diminish some greater mischief.

Concerning this, there are in the policy two engagements or promises, to one or other of which the insurer's

liability must in each particular case of this kind be traced. These are, the "sue and labour clause," and the engagement to pay general average.

The Sue and Labour Clause.

§ 326.—This clause, which is in the body of the policy, and is one of great antiquity, is as follows: "*And in case of any loss or misfortune it shall be lawful to the assured, their factors, servants, and assigns, to sue, labour and travel for, in and about the defence, safeguard, and recovery of the said goods and merchandises and ship, &c., or any part thereof (a), without prejudice to this insurance; to the charges whereof we, the assurers, will contribute, each according to the rate and quantity of his sum herein assured.*"

§ 327.—This clause is to be treated as an engagement distinct from the main body of the policy (b), and, therefore, not subject to the restrictions contained in the memorandum. The liability under it is not a liability for particular average (c). It is distinct from the rest of the policy in this further sense, that, although the underwriter's liability for a loss of the thing insured, resulting from a single casualty, is restricted to the amount of his subscription, yet he may be liable beyond that amount for such a loss when coupled with a claim under the sue and labour clause; as, when expense is incurred in an unsuccessful attempt to save a ship which nevertheless is totally lost (d).

§ 328.—The words "defence, safeguard, and recovery," imply the danger of some mischief greater, or supposed

(a) Sometimes, instead of "the said goods, etc.," the words used are "the subject-matter of this insurance." The meaning, as explained in § 90, is the same in either case.

(b) *Lohre v. Aitchison*, 2 Q. B.

D., at 509; *Dixon v. Whitworth*, 4 C. P. D., at 378.

(c) *Kidston v. Empire Mar. Ins. Co.*, L. R. 1 C. P. 535.

(d) *Lohre v. Aitchison*, in App., 3 Q. B. D. 558.

to be greater, than the cost of the means used to avert it. This is not necessarily a danger of total loss. Expense incurred in drying goods which have been wetted, in order to prevent the damage from growing worse, certainly comes within the terms of this clause (e). Nor are the words "sue, labour, and travel," to be used in too narrow a sense; it is all one whether the assured labours himself, or employs his servants to labour, or hires others to labour for him. Whether he employs his own barge to save or carry the goods, or hires a lighter or a forwarding ship for the purpose, each is alike a "labouring" within the clause (e).

Conditions: § 329.—Two conditions, however, are requisite to constitute a claim under the sue and labour clause: the apprehended mischief must be something for which the underwriters would have been liable, and the measure which gives rise to the expense claimed must be the act of the assured himself or of his agent or servant. If, for example, goods are insured "free of capture," it is clear that an expense incurred to prevent a capture could not be claimed under this clause; nor, if "against total loss only," an expense incurred merely to diminish damage or avert a loss other than total. The question always must be, whether, if the detriment escaped by means of timely care had come to a head for want of it, the loss would have fallen on the underwriters (f). And in the second place, this clause, which is inserted in order to encourage the assured to make timely efforts and incur needful expenses, applies only to efforts made and expenses authorized by him personally or by his servants or agents. Hence, where salvors pick up a ship derelict at sea, or as volunteers bring property into safety without being in any sense hired by an agent of the assured, the payment

Must be,
to avert a
danger
insured
against.

Must be
act of
assured or
his agent.

(e) *Kidston v. Empire Mar. Ins. Co.*, L. R. 1 C. P. 535.

Ins. Co., L. R. 1 C. P. at 543; 2 C. P. 357, at 364.

(f) See *Kidston v. The Empire*

for salvage is not a claim under the sue and labour clause (g).

§ 330.—The fundamental principle, that a claim under this clause supposes some worse evil averted, enables us to distinguish with confidence between expenses which fall within the clause and some others which at first sight seem to come near it. Thus the cost of repairing a damaged ship is not—the cost of earning freight by a transshipment is—a claim under the sue and labour clause. Why? Because, in the latter case there is, while in the former there is not, a worse evil in the background. If the cargo is not transhipped, and that without delay, the original ship having been disabled, the owner of the goods may be entitled to resume possession, and the freight will be wholly lost to the assured (h). On the other hand, the

Must be,
to avert a
greater
evil.

(g) *Aitchison v. Lohre*, 4 Ap. Ca. 755.

(h) This distinction, it is true, is open to the theoretical objection that such a total loss would not be the necessary or natural consequence of the perils insured against, but merely of the negligence of the assured, and therefore might not be recoverable from the underwriter; whence it might be argued that there is no real distinction between the two cases, and that the cost of forwarding is really only the measure of the detriment done to the freight, precisely as the cost of repairing is the measure of the damage done to the ship. The answer is, however, that such a construction, applied consistently, would leave the sue and labour clause absolutely without a meaning, which is not allowable. For, if the basis of any argument is to be, that the underwriter must in no case be liable for more than what the loss would have been had the assured done his utmost to prevent or diminish it, and that

the underwriter is in no case to pay for an expense incurred by suing and labouring, unless it can be shown that he, the underwriter, has been a gainer through it having been incurred, this is what could not be shown in any case,—for if the expense had not been incurred, the underwriter would still be entitled to insist on a settlement as if it had been. Take, for example, the case decided in *Kidston v. The Empire Ins. Co.*: an expense of, suppose, 200*l.* is incurred in forwarding a cargo, by means of which a freight of 500*l.* is saved. When this 200*l.* is claimed from the insurer, whose policy is free of particular average, he might answer: This expense was incurred, no doubt, but not for my benefit; since, if it had not been incurred I should not have been liable for your loss of 500*l.*, because you lost it through your own folly. And so of every other conceivable claim under the sue and labour clause. But then the assured has

cost of repairing the ship is the measure of the damage done to the ship by the accident. If the expense in question were not incurred, the damaged ship would still be there, repairable whenever the assured might please; so that the assured could not properly allege that in repairing his ship he was labouring on its "defence, safeguard, or recovery." The same distinction is illustrated by a case in which a cargo of rye, being heated through sea-damage, and in danger of becoming totally worthless if left in the confined hold of the ship, was landed and placed in warehouses in order to separate the damaged portion from the sound, and dry and cool what was heated; after which the sound rye was kept in the warehouse for a further period, until the ship was repaired and ready to take it on board. The rye was insured with the warranty "free of particular average." In this case it was decided that the underwriters were liable, under the sue and labour clause, for so much of the expense of landing and warehousing the rye as was necessary for separating the sound portion from the damaged,—in other words, for averting the danger of total loss,—but that, so soon as this end had been attained, the subsequent hire of the warehouse, being incurred merely as the result of an accident not exposing the rye to any danger of total loss, must fall on the assured (*i*).

Is the master the agent of the cargo-owner?

§. 331.—A question, of some practical importance, not yet determined by the Courts, is, whether the master of the ship is to be considered, for the purposes of the sue and labour clause, the servant or agent of the owner of the cargo, in incurring expenses either exclusively for the benefit of the cargo, or for its benefit or preservation

the unanswerable retort: What did you mean, then, by putting this clause into my policy? The clause purports to be, and is, a privilege, or bonus, intended to encourage personal exertions by rewarding the

assured for doing that which certainly in some sense he was bound to do. By this both parties are gainers, but principally the underwriters.

(*i*) *Meyer v. Ralli*, 1 C. P. D. 353.

conjointly with that of the ship. Some power of agency on behalf of the cargo, under circumstances of unforeseen necessity, when there is no time or opportunity for consulting the owner, the master of a ship undoubtedly has. Whether this extends so far as to confer on his actions that privilege, in some sense personal to the assured, which is given by the clause in question, seems to be a doubtful point. There are difficulties on either view. If we may take it that the master is for this purpose the agent of the cargo-owner, then the underwriter's liability to pay general average is almost completely merged in his liability under the sue and labour clause. If the master incurs expense in drying the cargo at a port of refuge to prevent its total destruction or greater damage, if he engages salvors or tugs to avoid some danger, by which the cargo together with the ship is threatened, or if for the same purpose he throws cargo overboard, slips from an anchor, cuts away a mast, or bears up for a port of refuge, all this, so far as the cargo's share is concerned, is suing and labouring for its defence, safeguard, or recovery. The cargo's share of general average, therefore, is on this view recoverable under the head of the sue and labour clause, with one exception only, namely, when the general average consists of salvage paid to persons not engaged by the master, but who have come on board as volunteers, or of sacrifices made for the common safety by such persons, supposing the master to be absent or the ship to be for any reason not under the command of the master or any deputy of his authorized by the owners (j). To this there

(j) Another way of putting the argument, to prove that general average is a liability under the sue and labour clause, as being virtually the act of the assured, is this :—The right to general average contribution is often said to be founded on an implied contract, supposed to be entered into at the moment of

danger between the owner of the ship and the several owners of cargo on board, whereby those whose property is sacrificed consent to give it, and those whose property is saved consent eventually to contribute towards replacing what is thus given. Originally, when the merchants sailed with their goods,

is perhaps no serious objection, except that it seems novel and somewhat needlessly complicated. On the other view, if the master is not to be regarded as the servant or agent of the cargo-owner, he certainly is the servant of the shipowner. If, therefore, he incurs expense about the defence, safeguard, or recovery of the ship, is not the shipowner entitled, under the terms of the sue and labour clause, to recover the whole of this expenditure, in the first instance, from his underwriters on ship and freight, leaving them to recover any contribution that may be due from the cargo? Such is, it appears, the law in the United States; and in a recent case, *Lindley, J.*, expressed a strong opinion in favour of this view (*k*). This, however, would be a still greater novelty in our practice. At present, the question can only be noted as one that requires further discussion in the Courts.

Mode of
calculating
claim on
policy.

§ 332.—Another question, which can hardly be considered as finally settled, has reference to the mode of calculating the claim under the sue and labour clause. "To the charges whereof," the clause runs, "we, the assurers, will contribute, each one according to the rate and quantity of his sum herein assured." This does not define what is to be the gross contributing capital. This question may come in two, or rather three, forms: either the "charges" here referred to may be charges for saving the thing insured, and that only, or, in saving it, they may procure the safety of something else,—and this either a

such contracts were actually made; and we have in some of the older sea-laws directions as to the very formula of words to be used in making them. (See, for example, a curious instance in the Laws of Oleron, cited in my book on "General Average," p. 267.) Later, this authority was delegated, first to a supercargo on behalf of all the merchants,—an institution introduced by the Venetians,—and sub-

sequently to the master of the ship. Thus, not merely as a matter of theory or speculation based on the necessity of the case, but historically and in fact, the master of the ship has been clothed with the character of agent for the owner of the cargo. (See *Schmidt v. Royal Mail S. S. Co.*, 45 L. J. (Q. B.) 646; *Crooks v. Allan*, 5 Q. B. D. 38.)

(*k*) *Whitworth v. Dixon*, 4 C. P. D., at 378.

different thing, or an accretion on the thing insured, such as a profit not anticipated at the time of insuring. In the first of these three cases, it seems clear on principle that the basis of the contribution must be, the value in the policy; for here there are only two parties concerned, the assured and the underwriter, and, as between them, it is not open to either to say that the real value of the thing insured is greater or less than the agreed valuation (*l*). In the second case, where some other thing besides that insured is saved in saving the latter, as, for example, where a ship is saved from peril by a tug, which in the same act saves the cargo, it would seem reasonable—apart from the doubt suggested in § 331—to hold that the other thing saved should come in as a contributor, and so the share of each individual underwriter be diminished (*m*). With regard to the third case, that in which an uninsured profit is likewise saved by the measures which save the goods insured, there is more doubt; but in practice, hitherto, the same rule has been applied to this as to the second case, that is, the profit has been brought in as a contributor. This is plainly equitable, and the only question is, whether it is consistent with the language of the clause. The clause appears to leave the matter absolutely undetermined. The value in the policy, as has been seen, represents the expectation such as it was at the time of insuring. Both parties know that there is a chance the market may go higher before the goods can arrive: thus there is, to the knowledge of both, an uninsured possible accretion to the goods. If the goods are saved from perishing, this accretion, if it exists, must be saved too; and there seems to be no reason why the underwriter, who has received no premium for it, should pay for saving it, nor yet why it should be saved gratis (*n*).

(*l*) *North of England Ins. Ass. Co. v. Armstrong*, L. R. 5 Q. B. 244.

(*m*) See *Kemp v. Halliday*, L. R. 1 Q. B. 520.

(*n*) The question dealt with in

Action
taken
must be
judicious.

§ 333.—The absolute undertaking in the sue and labour clause, to contribute towards the charges incurred by the assured, must be understood without prejudice to the implied condition that these charges shall have been reasonably and prudently incurred. If an unnecessarily expensive method of saving the property has unwisely been adopted, the underwriters will be liable, not for the amount actually incurred, but for so much as it would have cost to have saved the property in a judicious manner. For this latter amount, however, they are liable, notwithstanding that the expense has not in fact been incurred in this form (o).

this paragraph has come under judicial consideration in two recent cases. In *Lohre v. Aitchison* (2 Q. B. D. 501), a ship, after having been saved from the risk of total loss at a certain expense, was repaired at so great a cost that the particular average payable by the insurers reached the limit of 100 per cent.; whereupon it was first decided by the Court of Queen's Bench that the underwriters, having in fact derived no benefit from the expense incurred in saving the ship, were not liable to contribute anything towards that item; but in the Court of Appeal (3 Q. B. D. 558) this judgment was reversed, on the ground that this expense was claimable under the sue and labour clause, and formed a liability apart and distinct from the liability for particular average, and that the question was, not whether the expense had proved beneficial to the insurers, but whether it was incurred for the defence, safeguard or recovery of the thing insured. The case was carried to the House of Lords (4

Ap. Ca. 755), and there, unfortunately, went off on another ground. In *Dixon v. Whitworth* (4 C. P. D. 371), Cleopatra's Needle was insured for 3000*l.*, against total loss only, on a valuation of 4000*l.* Having broken adrift from its tug during a gale in the Bay of Biscay, the Needle was in danger of total loss, from which it was rescued by salvors, to whom the Admiralty Division awarded a salvage of 2000*l.*, valuing the Needle at 25,000*l.* The question came before the Common Pleas Division, whether the underwriters were liable for three-fourths or three twenty-fifths of this sum. Lindley, J., who tried the case, pronounced in favour of the former fraction. This decision also was appealed against (49 L. J. (C. P.) 408), and, like the other, went off on a different ground; namely, that the salvors not being the servants of the assured, there was no liability at all under the sue and labour clause.

(o) *Lee v. Southern Ins. Co.*, L. R. 5 C. P. 597.

General Average.

§ 334.—General average is a loss arising from a sacrifice Definition.
 fice purposely made for the preservation of the ship and
 all on board from danger,—whether the sacrifice consists
 of throwing overboard cargo, destroying this or that
 portion of the ship, or adopting measures which involve
 extraordinary expenditure,—which sacrifice, being made
 on behalf of all, must be replaced by the contribution of
 all. Thus it appears that general average has properly
 nothing whatever to do with marine insurance, this con-
 tribution being a right which exists independently of it,
 and indeed which existed many centuries before insurance
 was invented. Its connection with the law of insurance is
 restricted to a single point, viz., the liability of the insurer
 to pay back that which his assured has paid as his share.

§ 335.—The general average itself, or loss resulting The two stages.
 from the sacrifice (*p*), must be regarded as having two
 stages. Before distribution, it is either a loss of this
 or that portion of the ship or cargo, given for the rest,
 or the expenditure of so much money, paid for all by
 some one person, usually the owner of the ship. After
 distribution, it is a rateable assessment of so much per
 cent. on the value of the entire ship and cargo.

§ 336.—Now the loss of property as it exists before Direct liability of underwriters.
 distribution,—whether it be of cargo jettisoned or other-
 wise sacrificed, or of a mast cut away, or the like,—is
 recoverable by the owner of the thing sacrificed from his

(*p*) The term “general average”
 is often used loosely as applicable
 either to the sacrifice itself, the loss
 which it occasions, or the contribu-
 tion by which that loss is equalized.
 My reason for thinking that the
 term most properly applies to the
loss, may be gathered from the
 explanation of the word “average”
 given in note (*b*) to § 267. Accept-

ing the sense of the Ordonnance
 of Louis XIV. as that which
 accompanied the word on its intro-
 duction into English law, we find
 that an average is always a loss or
 expense, and that this was from
 the period referred to always divided
 under two heads, simple or parti-
 cular average, and common, gross,
 or general average.

underwriters, just as if it had been destroyed by the violence of the winds and waves (*q*). If the whole of some one commodity insured in one policy is thus destroyed, the claim is for total loss. If a part only is sacrificed, the claim is in practice treated as particular average. Whether this latter is strictly right, or whether such a loss can be for this purpose, while still in the stage preceding the distribution as general average, treated as *not particular* average, is a question which has not yet come before the Courts. This question must be reserved (see § 341) until we have set forth the precise position of the underwriters with respect to general average in the second stage, that is, after distribution.

The lien
for general
average.

§ 337.—As amongst the several owners of property which has been rescued from danger by a sacrifice of this kind, the obligation on each to pay his share of the general contribution is enforced, in the strictest manner practicable, by the laws of every maritime country. In most countries, a mutual right of *lien* is given, in virtue of which neither can the consignees obtain delivery of their goods until they have deposited, or given security for, their respective shares, nor is the ship allowed to quit the port until the share due from it to the cargo has been paid. In England, great progress has been made in this direction. The power of stopping the cargo until security is given for the cargo's share is now complete. With regard to the ship, any ship not owned in England or Wales may be stopped for general average by Admiralty process; and, with regard even to English-owned ships, it is now settled, first that the owner is bound, under liability to an action at law, to take from the several consignees of cargo delivered an adequate security for the claims of those whose cargo has been sacrificed, as well as to be personally liable for the share falling on the ship and freight (*r*); and secondly, under the County Court Admiralty Acts,

(*q*) *Dickenson v. Jardine*, L. R. 3 C. P. 639.

(*r*) *Crooks v. Allan*, 5 Q. B. D. 33.

that the ship may be arrested for claims not exceeding £300 springing out of the contract of affreightment,—a right which seems plainly to carry the arrest of the ship for jettison or other sacrifices of cargo (s). Practically, therefore, it may be said that the right of contribution for general average is secured all round by a *lien*.

§ 338.—Since, then, this liability to general average contribution constitutes a loss or expense, resulting from the perils insured against, and inseparably annexed to the thing insured, so that possession of it cannot be obtained without submitting to the payment, it seems to follow as a matter of course, even without any express reference to it in the policy, that the underwriter must be liable for it. But besides this, the policy contains the words, “free of average, *unless general*, under three per cent.” The exception of general average from this clause is held in the Courts to imply that the underwriter “expressly, absolutely, and universally undertakes to pay general average” (t).

§ 339.—As amongst the several owners of the property saved by a sacrifice, the liability to general average is determined by the law of the place at which the common adventure terminates; that is to say, the law of the port of destination when the voyage is completed, and, when it is not, the law of the place where the voyage is broken up and the ship and cargo part company (u). The underwriter, whose part it is simply to indemnify the assured for what he has been obliged to pay through the perils insured against, ought on principle to be universally subject to the same law. The decisions of our Courts go a long way towards establishing that he is so. Whatever

(s) *Alina*, 5 Ex. D. 227.

(t) *Per* Lord Campbell, in *Hall v. Janson*, 4 E. & B. 500. This undertaking, however, must of course be understood with reference to the perils insured against. For example, under a policy “free of capture,” the underwriter would

certainly not be liable for general average, if the sacrifice which gave rise to it had been made merely in order to avoid the risk of capture.

(u) *Fletcher v. Alexander*, L. R. 3 C. P. 375; and see *Hill v. Wilson*, 4 C. P. D. 329.

the assured has been obliged to pay to a third party, as his contribution towards general average, it is now settled that he can recover from his underwriter(v). The average, if rightly adjusted according to the right place for adjusting it, is as obligatory on the insurer as on the assured who has paid money under it; and it is beside the question to enquire whether the average has been rightly adjusted according to the law of England. The only point still undetermined is, whether a foreign adjustment is equally obligatory on the insurer of one who, instead of paying, has received under it a sum to which by English law he would not be entitled. It is commonly supposed, for example,—though the point may be open for argument (w),—that by English law a shipowner is not entitled to claim as general average the wages and provisions of his crew during detention in a port of refuge; an item which the laws of most foreign countries bring in as part of the loss. Suppose a general average to be incurred on a voyage to a port in the United States, where this loss is treated as general average, can a shipowner, who has recovered the cargo's share of the item in question under an adjustment drawn up at the port of destination, then proceed to claim the ship's share from his underwriters? It is conceived that he can: for the underwriter has engaged to pay general average, and this word general average must be construed in the same sense for all policies whether on ship or cargo, and that sense certainly is not "general average as understood by the law of England,"—since English law is not necessarily the basis when it is a question of money paid,—and can only be "general average as rightly adjusted," which again can only be, according to the law of the right place for adjusting it (x). That the point is not free from doubt,

(v) *Harris v. Scaramanga*, L. R. 7 C. P. 481.

(w) See *Atwood v. Sellar*, 5 Q. B. D. 286.

(x) *Mavro v. The Ocean Mar. Ins. Co.*, L. R. 9 C. P. 595, though not conclusive, certainly points in this direction.

and yet that underwriters as well as shipowners generally recognise that this is what they at least *ought* to intend, may be inferred from the fact that it is now usual to insert in policies on ships the clause "general average payable according to foreign adjustment if required."

§ 340.—The contribution to general average is assessed on the net market value of the cargo, whenever the voyage is completed, at the port of destination; in other words, on a value which is greater than the value in the policy, assuming the latter to have been fixed on the true basis as pointed out in § 44, whenever there has been a rise in the market subsequently to the time of shipment. For the reasons assigned in § 332, it is conceived that in such a case there ought to be a proportionate reduction in the sum paid by the underwriter; this being the case of an uninsured profit, saved by the sacrifice, and which therefore ought to contribute, but not at the expense of the underwriter, who has received no premium on it. The same rule in this matter, it is conceived, ought to apply to general average as to claims under the sue and labour clause (§ 332); more especially as it must often be difficult, if not impossible, to determine under which of the two heads the assured is entitled to claim.

§ 341.—I return now to the question reserved in § 336 for further consideration, viz., whether an undistributed loss by a sacrifice of cargo or ship's materials, claimed directly from the underwriter of the thing sacrificed, is claimable as *particular average*. This appears to me an extremely difficult question. In the general practice of adjusters, it is at present so treated: the question is, whether this practice is right.

In defence of it, it may be argued that the loss or damage of the thing insured must, as between assured and assurer, be either total or partial; and that every partial loss of the thing insured must, as between them, be a particular average (*y*). As between these parties, the

(y) *Ralli v. Janson*, 6 E. & B. 422.

words "unless general" in the memorandum are totally unmeaning, unless they are understood to denote the payment which the assured may be called on to make as a contribution, or general average after distribution. The engagement to pay general average, implied in these words, must consequently be understood in this sense only.

To this it may be answered that there is nothing unintelligible in supposing that the above clause in the memorandum refers to general average in its proper sense (§ 335, n. p.), namely, the sense of the Ordonnance, as *loss* caused by a sacrifice for the good of all; in which case the purport of the clause in question would be, that the underwriter, not unnaturally desiring to encourage sacrifices which prevent a total loss, does so by drawing a distinction between these and accidental losses, and promising to pay for the former without restriction as to amount (z). A further reason for taking this view is, that we thereby get rid of a complication springing from the "sue and labour clause." For, supposing for argument's sake that a merchant whose goods have been jettisoned cannot claim their value directly from his insurer *as* general average, the question would still remain whether he could not claim it under the sue and labour clause. In § 331 reasons were given for holding it at least probable that the act of jettison, when a portion only of the goods insured are thrown overboard, may be treated as a suing and labouring by the assured or his agent for the preservation of the remainder; in which case, since it is all one whether money is spent or money's worth thrown away, the loss by jettison may represent those "charges thereof" which the insurer has absolutely engaged to pay. But, if claimable under the sue and labour clause, it clearly is *not* particular average.

I must leave the arguments on either side to the judg-

(z) See also, in support of this view, the definition of particular average found by the jury in *Kid-*

ston v. Empire Mar. Ins. Co., ante, § 267, n. (a).

ment of the reader, confessing myself on the whole to incline towards those reasons which I have set forth last in order.

CLAUSES RELATING TO COLLISION.

§ 342.—This volume may now be brought to a close, its review of the ordinary or old Lloyds' policy having been completed. Under the head of insurable interest we have dealt with the subject-matter of the contract; then considered how to insure, with the penalties for doing this badly: next, examined the indemnity given by insurance, first as to quality, then as to quantity, for a total or a partial loss of the thing insured or for the cost of avoiding a worse disaster. By way of *annexe*, however, a few words must be added as to some accessory or supplemental liabilities of the underwriter: and first, for clauses relating to Collision.

§ 343.—Collision, which of late years has unquestionably been greatly on the increase, may involve a shipowner in heavy and various liabilities, to guard against which in a satisfactory manner by means of insurance has been and still is the subject of experiment. I will here briefly set forth, first the precise nature of these liabilities, and then some of the methods adopted thus to guard against them.

§ 344.—In addition to the damage done to the ship itself by the collision, the shipowner may, whenever the collision has been occasioned wholly or in part by the fault of the master or crew of his own ship, be liable to pay for damage done to the other ship or her cargo, or to the cargo of his own ship, or to passengers' effects on board either ship, or for loss of life or personal injury to the passengers on board either vessel, and to the crew of the other ship (*a*). If his own ship has been solely in fault, he is liable for

(*a*) As to the crew of his own ship, the principle of "common employment" would protect a shipowner, the Employers' Liability Act passed last session not applying to ships.

the whole; if both are in fault, the rule now is that the owner of each ship must pay one half of the damage done by the collision to the other, its cargo, and presumably—though this precise point has not yet been expressly determined—the lives and persons of those on board (*b*). These liabilities are again complicated by the fact, that by Act of Parliament no owner of any ship, whether British or foreign, is liable in the aggregate for such damages beyond the amount of £15 per ton in respect of loss of life and property together, nor beyond £8 per ton in respect of loss of property alone; such tonnage to be, the registered tonnage in the case of sailing ships, and in the case of steamships the gross tonnage without deduction on account of engine room (*c*). A deduction is allowed, however, for crew-space, both for sailing ships and steamers.

§ 345.—The manner in which these rules operate, when both ships are in fault, is as follows:—The owner of ship A. has to pay to the several claimants, as well those interested in ship B., her cargo, and the lives on board, as to the owners of cargo and claimants in respect of life on board his own ship, either one-half of their respective claims, or an aggregate sum, representing either £8 or £15 per ton, according as the question of life or personal injury comes or does not come into play (*d*). On the other hand, the owner of ship A. has to receive from the owner of ship B. a sum computed *mutatis mutandis* on the same principle in respect of damage the former has received. When the amount payable at £8 or £15 per ton is less than the aggregate claims upon it, a machinery is provided, which may be briefly described under the

(*b*) This paying of one-half each is [the practical result of the old Admiralty rule, that the damages of both vessels are to be put together, and divided equally between both.

(*c*) Shipowners now frequently insert clauses in their bills of

lading to exempt themselves from some of these liabilities.

(*d*) Or, as the case may be, he may be liable to satisfy the claims for loss of life and personal injury by payment of one-half, and may then pay into Court 8*l.* per ton in respect of the loss of property.

name of a "suit for limitation of liability," by means of which each of the claimants on this fund is to receive his rateable proportion. It is to be borne in mind that the suit of ship A. against B. is to be treated throughout, for the purpose of making this money settlement, as an entirely distinct suit from that of B. against A.: so that, for example, if B. can only pay a dividend upon the claims of A., while A. can pay B.'s claims in full, B. pays the dividend on the gross amount of A.'s claim, not on the balance, and B. receives from A. in full (e).

§ 346.—In addition to this liability for half damages as one of two wrongdoers, the shipowner presumably has a further liability as carrier towards the owner of cargo in his own ship, and to the persons on board it or their representatives in case of loss of life or personal injury; since as between the owner of the ship and these persons the liability is not for one-half but for the whole damage (f). Supposing, then, that the aggregate claims on him under the collision suit, including of course the half damage sustained by the cargo in his own ship, do not absorb the £8 per ton, and supposing further that the cargo-owner is unable to recover in full from the owner of the other ship the remaining half of his damages, it must follow that he may require his own shipowner to make up the deficiency, that is to say, still keeping within the limit of £8 per ton. And in the same way with claims for loss of life and personal injury by those in his own ship, up to the limit of £15 per ton.

§ 347.—The limit of £8 or £15 per ton applies to the principal sum or damages. In addition, the shipowner is liable to pay interest, usually at the rate of four per cent.,

(e) *Chapman v. Roy, Netherlands Steam Nav. Co.*, 4 P. D. 157. There is still a difference of opinion on the point determined in this case, as to which the judges were divided.

(f) I am not aware that this

precise point has been before the Courts, but it seems to follow necessarily from admitted principles of law: see *Lloyd v. Screw Colliery Co.*, 33 L. J. (Exch.) 269, and *Grill v. Same*, L. R. 1 C. P. 600, 3 C. P. 476.

on this amount, from the date of collision to the date of payment. He has likewise to pay costs, which may be divided under three heads, those of the main action, of the registrar and merchants for determining the amount of damages, and those of the suit for limitation of damages.

Such being the liabilities of the shipowner, we are in the next place to consider how he is to be protected against them by insurance. This is usually done, partly by means of a clause now universally inserted in policies on the ship, called the "Collision Clause," and partly by means of associations amongst shipowners for mutual indemnity against these and other similar liabilities.

Collision
clauses.

§ 348.—The principle of the Collision Clause is, that the underwriters will relieve the assured of three-fourths of his liability to pay damages for loss of property in and on board the other ship. He is to take one-fourth himself, as a check upon carelessness in the choice of servants: and his liability in respect of loss of life and personal injury, as well as for damage to the cargo in his own ship, are left untouched. There is a difference of detail in the clauses used by different insurance companies and underwriters, which should not be overlooked by the assured. Sometimes nothing is said about costs—a serious omission (*g*); sometimes it is stipulated that the basis of amount claimable shall in no case exceed £8 per ton; thus at once excluding costs and interest. Even where costs are provided for in the clause, underwriters may not be liable, unless it is expressly so stipulated, for the costs of the suit for limitation of damages, since the collision clause is frequently so worded as to make it appear that the underwriters cannot be interested in this suit. In short, there is an appreciable difference in the value of different collision clauses (*h*).

(*g*) Unless costs are specified in the clause, the underwriters are not liable for them, though the action be defended with their written con-

sent. (*Xenos v. Fox*, L. R. 3 C. P. 630; 4 C. P. 665.)

(*h*) One point to which some collision clauses fail to give the

§ 349.—The Collision Clause is a distinct engagement apart from the rest of the policy. The liability under it is not particular average, consequently is not subject to the limit of three per cent. The ordinary policy-stamp covers this clause as well.

§ 350.—The principle of the undertaking on the part of Indemnity Associations is, that the Association engages to supply what is defective in the compensation given by the Collision Clause, on the understanding, however, that the assured on his part shall do what in him lies to obtain the full benefits of that Clause, or shall settle with his co-associates as if he had done so; in other words, that his settlement with the Association shall be on the basis of his having fully insured the ship with the usual Collision Clause. This principle could, of course, be more simply and satisfactorily carried out if there were some agreed standard as *the usual* Collision Clause. This is a point towards which things are evidently tending.

§ 351.—This state of things, by which one portion of these liabilities is taken as a kind of accessory to a policy on ship, and the remainder by an Association of ship-owners, has evidently grown up in a gradual way, and presents a somewhat clumsy appearance. Quite recently, the project has been suggested of a fundamental change, whereby the "collision liabilities," either with or without "collision damage" or damage done to the ship itself by a collision, shall be made a distinct subject of insurance, by a policy effected with underwriters in the usual manner, but taking this risk and nothing else. One advantage of this method would be, that it would get rid of complications arising out of the ship's value, since the amount insurable would in every case be £8 or

indemnity expected is this : when the suit between the two ships takes place abroad, in a country where the limitation of 8*l.* per ton is not in force, the shipowner may

be liable up to the full value of the ship, while he may only be entitled to recover under his collision clause up to the amount of 8*l.* per ton.

£15 per ton, according as the risk of life were included or not.

The clause
"unless in
collision."

§ 352.—Concerning collisions, it may here be mentioned that it is beginning to be not unusual to add the words "or in collision" to the clause "unless stranded, sunk, or burnt." This addition has the inconvenience that it at once raises the question "collision with *what*?" Is the running up against a pier or wall, or striking floating wreck or drift-wood at sea—this last a very common occurrence—collision within the meaning of this clause? This ought to be defined (*i*).

The Foreign General Average Clause.

Effect of
this clause.

§ 353.—A clause continues to be inserted in policies, which at the time when it was introduced was one of considerable importance, but which the development of our law has now rendered almost immaterial,—namely, "general average payable according to foreign adjustment, if required by the assured." We have seen that, so far at least as general average consists of a payment to third parties, the underwriter, without any such clause, is liable for general average, if correctly adjusted according to the law of the foreign port at which the voyage terminates. The clause in question was originally intended merely to remove any doubt on this point; but now that this doubt is at an end, the continued retention of this clause has an effect which probably was never contemplated by those who inserted it. Since every clause in a contract must if possible be so construed as to mean something, the Courts have construed this clause to mean that when a foreign adjustment, drawn up at the proper place, has

(*i*) So far as this question can be answered in the absence of authority, it would seem that, since the word derivatively implies the contact of two bodies which move, but certainly now includes the running

into a ship at anchor, it should be taken to mean the contact of two bodies which are capable of moving. This would include the running into floating wreck or an iceberg, but not a pier or wall.

been acted on by the parties, the underwriters are bound by it whether it be right or wrong. If right, they are bound by it without a clause; the clause can only mean, then, to bind them by it though it be wrong (*j*). Another effect of this clause is that, where the general average consists of damage sustained by the assured's own goods, which damage by English law would be particular average, the underwriters on a policy free of particular average would be liable for it, on the ground that it has been treated in the foreign adjustment as general average (*k*).

§ 354.—A recent modification of this clause, viz., “to pay general average according to foreign adjustment *or the York-Antwerp Rules*, if in conformity with the contract of affreightment,” is more important. The York-Antwerp Rules constitute a sort of international code of general average, not as yet obligatory, but intended as a first step towards uniformity in the adjustment of general average throughout all maritime countries. Our own law has of late years so rapidly approximated itself towards these Rules, that it is probable before long the Rules themselves will be only important as bearing on adjustments abroad: but, at least until that is the case, the clause will continue to be necessary for the protection of the assured in English policies.

(*j*) *Per* Bovill, C.J., in *Harris v. Scaramanga*, L. R. 7 C. P. 481, at 489.

(*k*) *Mavro v. Ocean Mar. Ins. Co.*, L. R. 9 C. P. 595; 10 C. P. 414.

Loss on cargo sold or bottomried to defray extraordinary expenses.

§ 355.—I have reserved for this place the consideration of a subject, as to which the law seems at present to be in a state not altogether satisfactory; namely, the treatment of a loss resulting to the owner of merchandize, in consequence of having his goods either sold or pledged in order to raise funds to defray extraordinary expenses incurred in a port of refuge.

When a ship has by the accidents of navigation been driven to take refuge in some intermediate port, where it is necessary to incur expense for repairing or refitting the ship, in order to continue the voyage, the master, if unable to raise in any other way the funds requisite for the purpose, has the right either to borrow money on the security of the cargo, conjointly with the ship and freight, or, if this cannot be done, even to sell so much of the cargo as may produce the sum required, and apply the proceeds to the payment of these expenses. This is a right given to the master, in virtue of the necessities of his situation, by the sea-laws of all countries. The master, in cases of this kind, is not bound to inquire whether it may not be more advantageous to the cargo that it should be withdrawn from the ship, and sent to its destination in another bottom. Whether *bound* or not to complete the original adventure, by carrying on the cargo in the original ship, he is—at least unless the impolicy of doing so is absolutely clear—*entitled* to complete it; and, as a consequence, entitled to adopt whatever measures are necessary for the purpose. His right to pledge or sell cargo in order to raise the requisite funds, in case of need, is founded on the supposition that the cargo is at least indirectly benefited by the expenditure which enables it to reach its place of destination (*l*).

(*l*) *Gratitudine*, 3 Chr. Rob. 240, at 260—262.

When cargo has been sold to raise funds, the owner of it is entitled, upon the ship's reaching her destination with the remainder, to compensation for the loss by sale ; that is, in addition to the proceeds, to receive a further sum equal to the difference between the proceeds and the value at the port of destination. This difference, or loss by the sale, is treated in the same way as a bottomry premium, that is to say, is divided between the shipowner and the owners of cargo in the same proportion as is the capital sum expended at the port of refuge.

When money is raised on bottomry of ship and cargo, ship and cargo alike become co-sureties for the entire debt, no distribution of the expenses between the two interests being made until the termination of the adventure. The lien of the bondholder is upon the whole property for the entire expenditure.

Upon the arrival of the ship and cargo at their destination, three settlements have or may have to be made : first, the settlement between the bondholder and the owners of the property pledged ; secondly, the settlement between the shipowner and the owners of the cargo, to determine in what proportion each should contribute towards the expenses at the port of refuge ; and thirdly, in some cases, a supplementary settlement, in case one party has been compelled to pay to the bondholder more than his own proper share of these expenses. It is with this third or supplementary settlement that we have here alone to do.

The bottomry bondholder has the right, if his bond be not paid off when due, to arrest the ship and cargo by Admiralty process ; to detain the cargo until satisfactory bail or security be given for his ultimate claim on it ; to receive the freight and sell the ship, and then, if the amounts thus realized, after defraying the wages of the crew, the inward port charges, and the legal expenses incurred, are not sufficient to discharge the bond, the remainder is recoverable from the owner of the cargo. It

is to be observed that, unless the owner of the cargo consents to give bail, his cargo is retained, and in case of need sold in satisfaction of the bondholder's demand; so that the giving of bail is compulsory on the cargo-owner, if he would obtain possession of his goods.

The supplementary settlement consists, then, in case of bottomry, of a claim which the owner of cargo may have upon the shipowner, in case that portion of the bond which the former has thus been constrained to pay shall exceed that proportion of the expenses at the port of refuge which upon a right adjustment should fall to his share. In case of raising funds by a sale of cargo, the supplementary adjustment consists of the cargo-owner's claim for the proceeds of his goods, together with the compensation for loss by sale, minus his own proper share of the expenses at the port of refuge (*m*).

Now, in this supplementary settlement, when the balance of the account is against the shipowner, there is a radical difference between the position of an English or American shipowner, and that of a French, Dutch, German, or Spanish shipowner, and, indeed, it may be stated generally of any shipowner of the Continent of Europe. The former is simply liable for this debt, whatever be its amount. The latter has by the law of his country the privilege of a certain limitation of liability, analogous to our own statutory limitation of a shipowner's liability in cases of collision, but operating in a different way. The Continental shipowner either is, as a matter of course, or can by going through certain formalities become, exempt from any liability which exceeds the ultimate arrived value

(*m*) It is to be observed that in the case of a foreign ship the cargo-owner in such a case can by legal process obtain the same remedy which the bondholder has against the ship; that is, he can have the ship sold and retain the freight, subject to

the prior claims for crew's wages, portcharges, and legal expenses. When this is done, that which is here called the "deficit" consists, of course, of what remains of his claim after deducting the amount thus realized.

of his ship and freight (*n*). Thus, in the case supposed, when the ship and freight have been either absorbed by the bondholder, or taken in satisfaction by the owner of the goods sold, there is no further claim upon the shipowner. However solvent he may be, and however ready to pay any just demand upon him, he is entitled by the laws of his country to say, that he owes nothing. The claim under the supplementary settlement thus described, whether it be for a deficit on the bottomry bond, or a deficit on cargo sold to raise funds, can of course only be made upon the shipowner in the country in which he resides, and therefore only according to the laws of that country. It is a claim, therefore, which is valid against an English or American shipowner, but does not exist as against a shipowner subject to what we may call the Continental rule.

Now the question arises, what effect ought this difference between the position of one who imports cargo in an English or American ship, and one who imports cargo in a ship subject to the Continental rule, to have upon the liability of their respective underwriters? This is a question which has not yet been satisfactorily answered.

In the case of an English ship, it has been decided that the deficit here in question, whether on bottomry or sale of cargo, constitutes a *débt* due from the shipowner, and is not claimable, under the head of a loss by the perils insured against, from the cargo-owner's underwriters. What we have to consider, then, is, whether the reasons on which these decisions are founded are, or are not, applicable to the case in which such a deficit occurs where the ship is subject to the Continental rule above explained.

(*n*) For example, by the German Code, Art. 452, "The shipowner is not personally liable for the claim of a third party, but is only answerable to the extent of ship and freight. . . when the claim is made

on account of a legal transaction, concluded by the master as such, in virtue of the authority he lawfully possesses, and not in consequence of an especial power of attorney" (Wendt, Maritime Legislation, 198).

Sale or pledging of cargo to raise funds.

The most vigorous and compact exposition of the grounds on which the decisions as to deficit in English ships are based is contained in the following passages :—

"In ordering the repairs of the ship," said Patteson, J., "the master acts exclusively as agent of the owner of the ship. No other person but the owner of the ship, or his agent, can have any authority to order the repairs. . . . Being, then, the agent of the shipowner in ordering the repairs, how can he be the agent of any one else in borrowing money to pay for those repairs? If, in order to borrow that money, he is obliged to pledge not only the ship but the cargo, he in effect borrows money on the cargo for the benefit of the shipowner" (o).

"To accomplish the object of repairing the ship," said Pollock, C. B., "the master is authorised to bind his owner by causing the repairs to be done on his credit, in which case the tradesman may sue the owner; or by borrowing money on his credit when that is necessary, in which case the lender has his remedy against the owner; or by selling a portion of the cargo, which is in effect borrowing from the shipper through the medium of a sale (p), and in this case the shipper may sue the shipowner; or the master may hypothecate part or the whole of the cargo, which gives a right to the proprietor of it to recover a compensation from the owner of the ship. All these are merely modes of raising money by the agent of the shipowner on his account and for his use, to enable him to do his duty by repairing the vessel; and in all the shipowner must repay the debt. The agency to borrow by these various modes, and so to bind his employer to the lender, is cast upon the master by the necessity of the case" (q).

These extracts show the grounds on which the deficit, in the case supposed, where the ship is English, constitutes

(o) *Duncan v. Benson*, in Exch. Ch., 3 Exch. 644, at 655.

B. & Ald. 237.

(q) *Duncan v. Benson*, in Exch.,

(p) See *Richardson v. Nourse*, 3 1 Exch. 537, at 555.

a debt due from the shipowner. The ground for holding that this deficit is not, in such a case, claimable from the underwriter as a loss by the perils insured against, appears from the quotation which follows:—

“The injury to the assured,” said Lord Ellenborough, “was caused by the sale of their goods; but no one will contend that the sale was an immediate consequence of a peril of the sea. The peril of the sea damaging the ship rendered it innavigable; to restore its navigability a refitment became necessary. The captain, who was interested in and bound to have the ship in a navigable state, being unable to raise the means for refitting her, was obliged to apply to the owner of the goods for a loan, through the medium of a sale of part of the goods. It was therefore a species of forced loan which was the proximate cause of loss to the owners from the sale of their goods. This was indeed connected with a peril of the sea, because a peril of the sea occasioned damage to the ship, which made repairs necessary, and funds to provide those repairs; but it was the want of funds *aliunde* which obliged the captain to have recourse to a sale of the goods. In conformity, therefore, to the rule that the proximate cause, and not that which is remote, is to be looked to, I think the underwriter is not liable” (r).

An examination of these arguments will show that, while they are conclusive in the case to which they were intended to apply, that is to the case of an English ship, yet to the case of a ship subject to the Continental rule they are not applicable without considerable modifications, and it is, to say the least, questionable whether, after those modifications have been made, the force of the reasoning does not disappear.

The arguments may be brought under two heads:
1. The forced loan from the cargo is made by the master in order to repair the ship under the authority given to

(r) *Powell v. Gudgeon*, 5 M. & S. 431, at 436.

Sale or pledging of cargo to raise funds.

him as the servant of the shipowner: 2. The merchant's loss is only remotely a consequence of the perils insured against, the direct cause being the shipowner's or the captain's want of means to provide funds in some other way.

The first of these arguments applies only to the case in which the master has an authority to act in the way here supposed,—that is, an unconditional authority to pledge the owner's credit for the repair of the ship to an amount which may exceed its ultimate value. This authority the master of an English or American ship has: but can it be said that such authority is possessed by the master of a ship which is subject to the Continental rule? The extent of the master's authority is determined by the law of the flag (s). Those who ship goods in a foreign vessel have no right to expect all the advantages of English law, in matters which may, or as in the present case which must, be dealt with in the event of dispute by a foreign tribunal. If, then, the law of the flag gives to the master no authority in any event to pledge the owner's credit to an extent beyond the ultimate arrived value of the ship including freight, and if nevertheless the master does repair the ship to an extent beyond that value, and does pledge the cargo for money requisite for that purpose, must it not be said, either that his action in so doing is unjustifiable, or that his authority for thus repairing the ship, and therefore for raising money to pay for such repairs, is derived from some other source than his ordinary agency as the servant of the shipowner? By the general law maritime, the master of a ship undoubtedly has authority to act in the way supposed; and this authority, as was laid down by Lord Stowell in the case of the *Gratitude*, rests on the benefit which the cargo is

(s) *Lloyd v. Guibert*, in Exch. Ch. L. R. 1 Q. B. 115. This decision further shows that even in an English court of law the owner of

goods has no right of action against a French shipowner for the deficit here in question, when the law of France gives no such right.

supposed to derive, though perhaps only indirectly, from the completion of the voyage contracted for. Does not this amount to saying that, in ordering repairs, and raising money to pay for them, to an extent which may be greater than the value of the ship, the master's authority, *quoad* such possible excess, is derived from his right of agency on behalf of the cargo? If so, is he not, in so doing, the servant and agent, not of the shipowner, but of the owner of the cargo? It seems difficult to hold otherwise: but if this be so, that which I have marked as argument No. 1 disappears, or rather may be turned the other way. The deficit in question, instead of being a debt due from the shipowner, is now found to be a charge thrown upon the cargo by the master in his capacity of agent for the owner of the cargo. If it can be truly said, as in many cases it may, that the incurring of this charge has been the means of rescuing the cargo from a greater loss (*t*), then it would seem that the item in question—I am still speaking only of ships subject to the Continental rule—might be claimable under the “sue and labour clause.”

The destruction of argument No. 1 does not leave argument No. 2 intact. If it could be laid down—as in the case of an English ship it can be—that the deficit in question constituted a debt due from the shipowner, then no doubt the proximate cause of the merchant's loss may rightly be said to be, the shipowner's failure to pay his debt (*tt*). If it is not a debt from the shipowner, this cannot be said: in which case either the argument as to *causa proxima* must be abandoned, or it must in some way be modified so as to meet these changed conditions of the question. Let us now consider, then, how the argument stands as to this point.

(*t*) As for instance, when, unless the ship is thus repaired, the extra cost of hiring another ship, or the loss by selling the cargo at the port of refuge, would be greater than the

deficit on the bond.

(*tt*) See per Brett, J., in *Harris v. Scaramanga*, L. R. 7 C. P. 481, at 494.

The merchant's loss is in one sense, of course, not the direct consequence of the peril insured against; that is to say, some other things intervened; viz. the resolution to repair the ship and continue the voyage, and the resolution to raise funds for the purpose by a bottomry loan on ship and cargo, together with the several steps requisite for carrying these resolutions into effect. Everything else followed in the ordinary course of law, and, given these two resolutions, no other result but this loss to the merchant could have followed, unless by some accident out of the common course of things. These two resolutions, then, must be treated as the proximate causes of the loss, if there is any cause nearer than the perils insured against. But, of these resolutions, the first was in the common course of things: it was no more than the captain's duty, the ship having been damaged, to take the steps requisite for carrying out his contract by restoring her to a condition of navigability. There remains only the second resolution, that of raising the money on bottomry. Here we come at once upon the difference between an English ship and one subject to the Continental rule. The master of the former has, theoretically at least, an alternative: he might either pledge his owner's credit or raise money on bottomry. This choice is not open to the master of the latter: the case being, *ex hypothesi*, one in which it is possible that the expenditure may exceed the ultimate value of the ship and freight, this captain has no authority to bind his owner for the excess: he is compelled, therefore, to raise money on the security of the property, and on such terms that on no event shall the sum payable be greater than the value of the ship and freight. The resolution to make such a loan, therefore, is for this captain the mere natural consequence and part of the resolution to repair his ship. Thus it appears that in no portion of the several processes which lie between the peril insured against and the merchant's loss is there anything which can properly be

called a distinct and independent cause of loss. All follows in the ordinary course of things, and, on the principles which ought to regulate the maxim *causa proxima*, &c. (*ante*, §§ 186, 204), this deficit ought to be regarded as the necessary and immediate consequence of the perils insured against.

This reasoning might be thought somewhat speculative, were it not confirmed by the decision of the Court of Queen's Bench in *Dent v. Smith* (*u*). A ship, with specie on board, having been stranded in Turkish territory, the master, for the safety of the specie, landed it, and deposited it with the Russian consul. The ship eventually became a wreck. In result, by the judgment of the Russian consular court, the specie was made to pay a large sum of money, on a principle the legality of which was questioned by the underwriters. The Court of Queen's Bench decided that the question itself was immaterial: it was enough that by reason of a peril insured against, and of action properly taken thereupon by the captain, the specie had come into the hands of the Russian authorities, and in order to get it back the assured had been compelled to pay the sum claimed. This was enough, the Court held, to render the loss an immediate consequence of the perils insured against, and therefore one for which the underwriters were liable. "It seems to me," said Cockburn, C. J., "that the loss was an immediate, necessary, and by no means too remote, consequence of the wreck. . . . There has been . . . a loss which the assured could not by reasonable means prevent, and . . . that loss flowed immediately from the wreck" (*v*). Lush, J., said: "It was money necessarily paid by the owners of the gold, as they could not get it till they did pay. They paid therefore under that compulsion in order to get possession of the goods which were *prima facie* lost, or would have been lost if they had not the means of

(*u*) L. R. 4 Q. B. 414.

(*v*) L. R. 4 Q. B. at 447.

getting them back again. Therefore I think that this was a loss by the perils of the seas " (w).

If, now, we consider the question on broad grounds of general utility, it seems by no means either unreasonable or undesirable that a distinction should be drawn between the two cases, so that, with English and American ships, where the cargo-owner has a remedy against the shipowner, the underwriters should not be liable, but that, when the ship belongs to a country, the laws of which give no such remedy against the shipowner, the loss should be recoverable under the policy as cargo. The loss is in its nature one which ought not ultimately to fall on the insured owner of the goods thus pledged or sold: for it is a loss springing out of the perils insured against, in no way resulting from any fault or indeed action of the assured, and which the assured is powerless to prevent. Some remedy, then, the assured ought to have. Where the law gives him a remedy against the shipowner, he is safe, provided the shipowner is solvent; and the solvency of a shipowner is a risk which ought rather to fall on the merchant, who has trusted his goods to him, than on his underwriter. But where the law gives no such remedy, it certainly seems more conformable to the nature of the contract of insurance that the loss should be borne by the insurer, than by the assured.

Thus the question appears to stand, apart from the recent decision of the Court of Queen's Bench in *Greer v. Poole* (x). This is the judgment of Cockburn, C. J., and Lush, J., and therefore must be supposed to be in conformity with the principles as to consequences laid down by those learned judges in *Dent v. Smith* (y); since, had they seen reason on further consideration to change the opinion previously expressed by them, they would no doubt have said so,

• (w) *Ib.* at 453. See, however, 493.
the construction put upon *Dent v. Smith* by Brett, J., in *Harris v. Scaramanga*, L. R. 7 C. P. 481, at

(x) 5 Q. B. D. 273.

(y) L. R. 4 Q. B. 414.

and have given reasons for the change. There must, therefore, be some difference between the two cases, which certainly is not obvious on the surface.

The case of *Greer v. Poole* (z) directly raised the question here considered. The owner of goods in a French ship had been compelled to pay, as the deficiency under a bottomry bond, a sum which by the law of France he was not entitled to recover from the shipowner. The Court held that neither could he recover it from his underwriters. The judgment is very short: the only material words in it being the following:—"It is," said Lush, J., "contended that this was under the particular circumstances a loss by perils of the sea, the circumstances relied on being that the French law entitled the owner of the vessel in question to abandon the ship and freight to the bondholders and thus to release himself from further liability, the French law differing in this respect from English law. Whether this contention is well founded or not is not in our opinion material; for, supposing it to be so, it does not make the loss a loss by perils of the sea. The proximate cause of the loss, to which alone our law has regard, was the inability of the agent of the shipowner to pay off the charge which he had for want of funds at Gibraltar" [the port of refuge] "created on the cargo. The goods sustained no seadamage" (a).

The brevity of this judgment has this disadvantage, that there are no means of knowing whether the considerations on the other side, such as those here put forward, have been so present to the minds of the learned judges as to have been duly weighed (b). This is not satisfactory to those who attach some importance to those considerations; particularly when it becomes necessary to

(z) 5 Q. B. D. 273.

(a) 5 Q. B. D. at 274.

(b) Indeed, the words "*inability of the agent of the shipowner*" seem to imply that the point really at

issue could not have been before them: there was no other inability than that created by the law of the flag.

explain to a merchant who has sustained a loss of this kind the reasons why he is not to be indemnified by his underwriters. The merchant may have to choose between submitting to a loss which he knows to be real, for reasons which he cannot understand, or carrying the question, as he may, to the Court of Appeal.

This case of *Greer v. Poole* raises a further question, springing out of the foregoing, concerning which a few words must here be set down. When the cargo belongs to two or more persons, and the goods of one of them have been sold to raise funds, or to pay off a bottomry bond, and there is a deficit resulting from the non-liability of the foreign shipowner, is this loss to fall exclusively on the merchant whose goods have been sold, or is it to be borne rateably by all the owners of cargo, all of whom have by reason of such sale had the advantage of having their goods brought to their destination? In the case of a bottomry bond, I believe the practice of the Admiralty Registry is to make some kind of rough proportionate levy, when there are several owners of the cargo, so as to give some approximation to a rateable contribution amongst them. In several countries of the Continent, this mode of settlement has been reduced to a system. In Germany, as may be learnt from the decision in *Harris v. Scaramanga* (c), under the terms of the general German Code (Art. 838, No. 1, and Art. 734) (d), the deficit in question is treated as a *quasi* general average amongst the several owners of cargo, which is then to be borne by the respective underwriters of each. The analogy between such a contribution and general average properly so called has been recognised in our Courts to this extent, that an underwriter on goods under a policy containing the clause "to pay general average as per foreign statement, if so made up," has been held liable under this clause to pay for the contribution in question (dd).

(c) L. R. 7 C. P. 481.

(d) *Ib.*, at 485, 486.

(dd) *Maoro v. Ocean Mar. Ins. Co.*, L. R. 9 C. P. 595; 10 *id.* 414.

Then comes the question : if by these laws the insurer is liable for this deficit, under the name of general average, when the cargo belongs to more persons than one, can it be said that he is not liable for the same loss, when it falls on one person only, the owner of the entire cargo ? This question arose in the case of *Greer v. Poole* (e), but appears to have been practically ignored.

In the meanwhile, so long as our law is in this unsatisfactory state, a merchant who imports goods in a foreign ship (other than American) will do well to insert in his policy some such clause as "In case of bottomry or sale of cargo to raise funds, this policy to cover the risk of loss arising to the assured from the insufficiency of the ship and freight to pay the shipowner's share ;" or, perhaps, more briefly, "to include loss by deficit on bottomry bond or sale of cargo to raise funds."

(e) 5 Q. B. D. 273.

APPENDICES.

APPENDIX A.

Insurable Interest.

CAN it be laid down as a general proposition that an expectation, to be insurable, must be such as is liable to be defeated by no other contingency except the perils insured against?

The question here has reference, not to the state of things at the time of insuring, but to that at the time of the loss: and it might more correctly be formulated thus: before an underwriter can be called on to pay a loss by one of the perils, must the assured prove that, if such a loss had not taken place, that expectation for the loss of which he is claiming indemnity was not merely probable, but certain?

The difficulty in answering this question either way may be expressed in the most abstract form thus:—If the insurer is liable, a probability of gain is converted into a certainty, and the assured is *pro tanto* a gainer by the shipwreck or other disaster,—in other words, the insurance operates to that extent as a wager. If the insurer is not liable, then there is one kind of risk of loss which cannot be insured against: for, at the time of the shipwreck, there was a probability of gain, of which a shipwreck, if followed by non-payment by the insurer, deprives the assured.

If we were called on to answer the question at this point, without reference to authority, there could scarcely be a doubt that the second of these two difficulties should outweigh the

first. Every possible risk of loss through sea-peril ought to be insurable, except so far as it is expressly forbidden by the Legislature. An insurance "by way of wagering or gaming" is forbidden: but this must be taken to mean, an insurance of which the main scope and purpose is wagering, not one which may incidentally have the effect of a wager, by making shipwreck more profitable to the assured than safe arrival; otherwise, all valued policies would either be prohibited or at least cut down to the actual worth of the thing lost.

But we must look to the authorities. The result may be briefly summed up as follows. With respect to freight, it has been clearly settled, by a great number of decisions, of which the orchella-weed case (*f*) (§ 23) is a fair sample, that no loss of freight can be recovered, if at the time of the loss the expectation of earning freight was liable to be defeated by any other contingency, however improbable, than the perils insured against. If a general rule is to be inferred from the particular instance of freight, there is no doubt it must be the rule of exclusion. And the decision in *Knox v. Wood* (*g*), with respect to commissions or profits on goods which at the time of loss had not been purchased (§ 31) points in the same direction.

Those who take this side in the argument may fairly contend that a rule of law so clearly established with regard to freight ought in consistency to be extended to analogous cases. There is a distinction, they would say, between merely giving too large an amount of indemnity for a loss which has been actually sustained, as in the case of a valued policy, and giving a so-called indemnity for a loss which may not be sustained at all, as would result from treating the mere chance of a loss as equivalent to a certainty. The latter seems to come much nearer to a wager than the former.

On the other side it may be argued:—First, that freight stands in a peculiar position, and is unlike any other kind of interest, on account of its intimate connection with the value

(*f*) *Patrick v. Eames*, 3 Camp. 441.

(*g*) *Knox v. Wood*, 1 Camp. 543.

of the ship, as explained in § 22. The rule of law, which limits the right to insure freight *eo nomine* to freight actually contracted for, has not really the effect of prohibiting the insurance of other future freights which are as yet uncertain expectations; because all these future expectations are in fact insured, in insuring the ship. Hence the interest in freight is not analogous to other interests, and should not be made the standard for them. Secondly, there are decided cases inconsistent with the rule of exclusion contended for, viz., *Hill v. Secretan* (*h*), (§ 11), where the expectation of a consignment was held to give an insurable interest, notwithstanding that the consignor might, for aught that appears, without being liable to an action at law, have consigned the goods to someone else, and so, without any peril of the seas, defeated the insured expectation. The same observations apply to the decision in *Wilson v. Martin* (*i*), (§ 39). Thirdly, to the argument founded on a distinction between a valued policy and the case now in question, the answer is, that the state of things at the time of the loss must be looked to, and that at that time there existed a probability, which was of some value, and might perhaps even have been bought and sold: and this probability was destroyed by the shipwreck, so that if the underwriter pays for it as if it were a certainty, he may indeed be paying too much, as he sometimes does on a valued policy, but it cannot be said that he is paying for that which is no loss. Lastly, the rule as laid down by Willes, J., in *Seagrave v. Union Mar. Ins. Co.* (*j*), (§ 11, note *j*), is inconsistent with the severer view.

These last arguments appear to me stronger than those on the other side.

(*h*) 1 B. & P. 315.

(*j*) L. R. 1 C. P. 305.

(*i*) 11 Exch. 684.

APPENDIX B.

Total Loss of Part.

MR. ARNOULD says that "where a cargo is made up of separate packages, capable of distinct valuation in the outset, and the insurance appears, from the terms of the policy, to be separately effected on each distinct package, in such cases there can be little doubt that the loss will be treated as a total loss" (k).

The proposition, thus cautiously worded, may be perfectly true, and yet it may be an error to suppose that the mere circumstance that each package is separately valued would constitute a separate insurance on each package. A careful examination of the authorities will show that the point raised in the text,—whether if some out of more packages of one commodity be wholly lost, this would be claimable as a total loss in case the packages were separately valued in the policy (§ 216),—not only has not been expressly decided, but is hardly, if at all, touched by the various dicta of the judges. These dicta go no further than to establish the very different proposition laid down by Mr. Arnould. In *Ralli v. Janson*, Jervis, C. J., says: "The fact of the cargo being in bags only renders it more practicable to value and insure each bag-full separately; but, *in the absence of a separate valuation, or other similar expression, to indicate an intention to insure each package severally as well as the whole jointly*, it does not of itself show that the policy, which is in terms upon the whole, was intended to apply severally to each particular bag" (l). This judgment, in Exchequer Chamber, expressly overrules *Davy v. Milford* (m), and condemns, as the error of a reporter, what Lord Abinger is supposed to have said in *Hills v. London Ass. Co.* (n). In *Entwistle v. Ellis* (o), where the very point now

(k) Arn. Ins. 1059 of 2nd edit., 976 B., at 442.
of 5th edit.

(l) 6 E. & B. 422, at 429.

(m) 15 East, 559; overruled, 6 E. &

(n) 5 M. & W. 569, at 576; corrected,
6 E. & B., at 436 and 442.

(o) 2 H. & N. 549.

before us seemed to be raised, although the decision went on another ground, the judges carefully abstained from pronouncing an opinion that a separate valuation would have the effect supposed; indeed, Bramwell, B., rather implied the contrary, saying, "I doubt, too, whether, if this declaration"—the separate valuation of 8s. 3d. per bag—"had been inserted in the body of the policy, it could be construed as anything more than a mode of showing how the value was calculated" (p).

The American law on the point is summed up by Mr. Phillips as follows:—"Whatever may be the doctrine in England, there is no question that in the United States the assured has no claim under this exception" [free of particular average] "on account of a partial destruction of the value of the article, or the destruction of part of the article, whether it may have been in bulk, or in separate parcels or packages, *unless the policy indicates that a loss is to be adjusted on different parcels or divisions*" (q).

Thus we are brought to the question, whether a distinct valuation of the article insured at so much per bale or package is to be taken as indicating an intention to treat each package as if separately insured.

There is, in the first place, nothing in the words themselves which, apart from custom or a general understanding, would carry that meaning. A separate valuation is on the face of it nothing but an agreement that the value of each several package shall be taken as so much,—an agreement very convenient for avoiding dispute and facilitating an adjustment. Is there, then, any custom or general understanding importing a meaning not obvious on the surface, viz., that a distinct valuation constitutes a separate insurance? Custom, in this direction, there is none: before *Ralli v. Janson* such total losses of part were paid without distinction, whether the goods were valued in the lump or in detail; since *Ralli v. Janson* such losses have in either case been in practice excluded; so that there never has been a time when the suggested distinction has been acted on in practice. As to a general understanding,

(p) 2 H. & N., at 555.

(q) § 1773, p. 443.

that is certainly the other way ; as is proved by the fact that whenever it is intended to divide the subject-matter of insurance into parcels, each of which shall be treated as a distinct insurance, this is done by means of special clauses called "average clauses." In insuring cotton, for example, the usual course is to value it in the policy at so much a bale, and to insert the clause "average on each ten bales running numbers, as if separately insured." This clearly implies an understanding that, though each bale is valued separately, the question of average or total loss must be dealt with by a reference to the whole, unless this rule be relaxed by an average clause.

Neither the grammatical construction of the words, then, nor any usage or understanding, carries the wider meaning contended for.

APPENDIX C.

Effect of Loss of Voyage.

It may be thought somewhat startling to maintain (§ 218) that goods which are sound, and may fetch a fair price at the port of refuge, may, merely because they cannot be forwarded to their destination, be for insurance purposes considered as totally lost. Must there not be something wrong in reasoning which leads to a conclusion apparently absurd ?

It may at once be acknowledged that the English law as to total loss would be more self-consistent (r), and if one dared to say so more conformable to the good sense at least of mercantile men, if it could once for all sweep away the doctrine that a loss of the voyage, while the goods remain in specie, and are of some value somewhere, can amount to a total loss of the goods (s). Is not the doctrine itself a relic or survival of the

(r) Since the doctrine as to loss of voyage is at present applied to merchandise only and not to ships.

(s) The law in the United States is stated to be, that the mere loss of the

voyage does not in any case by itself render a loss total : for this purpose there must be either an entire destruction of the goods, or an entire change of species (Arn. Ins. 1041 of 2nd edit.).

old notion that insurance is in its nature a sort of wager? It is not easy on any other hypothesis to account for this doctrine. The argument on which it is ordinarily based seems to be insufficient on the surface. That argument, as given for instance in Lord Abinger's judgment in *Roux v. Salvador*, amounts simply to this, that what is insured is not merely the goods but likewise the performance of the voyage. "The object of the policy," says the learned judge, "is, to obtain an indemnity for any loss that the assured may sustain by the goods being prevented by the perils of the sea from arriving in safety at the port of their destination" (t). Granting this, does it follow that if *this* object of the policy is frustrated, the loss to the assured must necessarily be treated as if total? Are there not really two objects of insuring,—the physical safety of the goods, and likewise their reaching their destination? If the goods are actually destroyed, both these objects are frustrated: but if the goods are in physical safety, and within the control of the assured, but cannot reach their destination, one object only is frustrated, the other is secured,—wholly secured, if the goods are sound, partially secured if they are damaged. It is as though two things were insured in one policy, and one of them were destroyed and not the other: there might be some reason for saying that there was a total loss of one, but not of both.

Can it then be argued that so firmly-rooted a doctrine of English law as this, that an inevitable loss of the voyage constitutes a total loss under a cargo policy, ought to be given up? At least the writer of an elementary treatise, whose business is merely to state as well as he can what the law is, may fairly say that such a speculation is entirely out of his province. To say nothing of other authorities, the judgment of the Court of Exchequer Chamber, in *Roux v. Salvador*, acted on without question for half a century, seems to be conclusive on the point.

It has been suggested, however, that this judgment must not be extended beyond the circumstances of the particular case it dealt with. In *Roux v. Salvador* (u) the goods were sea-

(t) *Roux v. Salvador*, 3 Bing. N. C. 266, at 278. (u) 3 Bing. N. C. 266.

damaged, and so badly seadamaged that, even if they could be carried to their destination, they could not have arrived there without a change of nature, so that they would not have been the same merchandize, nor indeed merchandize at all. To apply the same rule to goods which are sound, is to go further than the precedents carry us,—and further in a wrong direction (*v*).

It is quite possible, perhaps not unlikely, that if the question is brought in this shape before the Courts of law, they may draw a distinction between goods which are sound, or, if damaged, not so damaged as to have any unfitness *in themselves* for being carried on, and goods in the condition above described. Some faint indications of a disposition to draw such a distinction may here and there be observed in recent dicta of judges. All that I have said in the text amounts to this, that it will be difficult to find a logical basis for such a distinction. If sound goods which can by no possibility be carried to their destination are not totally lost, how can it be maintained that damaged goods, which in like manner cannot be carried on, yet are of some value to the owner where they are, are totally lost? If the loss of voyage is not by itself a ground for pronouncing the loss total, what other ground is there? In fact, what difference is there, as respects the totality of the loss, between the two cases? In both alike, the assured suffers or may suffer a pecuniary loss, from the necessity of selling the goods in a market for which they were not intended. If the goods are damaged, the assured suffers a further loss by reason of that damage. But this further loss, which must now be looked at by itself, since it is the only difference and ground of distinction between the two cases, is not total, since the damaged goods are of some value. The choice lies, then, between being illogical—which in a scientific system of law is a great evil, and either a radical change in the law, or an acceptance of the, no doubt paradoxical, extension of it to the case of goods which are sound.

(*v*) See, however, as against this, 518, and particularly what is said by *Rodocanachi v. Elliott*, L. R. 9 C. P. Bramwell, L.J., at 522.

APPENDIX D.

Customary Average Clauses.

Alkali—Each 10 casks.
Arrowroot—Each 20 barrels or 50 tins.
Cassia Vera—Each 60 packages.
Camels' Wool—Each 5 bales.
Cattle—Live-stock clauses—
 Including all risk of shipping and until safely landed.
 Against all risks including mortality and jettison arising from any cause whatsoever.
 Animals walking ashore, or, when slung from the vessel, walking after being taken out of the slings, to be deemed arrived, and no claim to attach to this policy on such animals.
 Each animal to be deemed a separate insurantee.
 (There are several variations on this clause.)
Cigars—Each case.
Cinnamon—Each 5 bales.
Cochineal—Each bale.
Coffee—Every 10 hogsheads and tierces, 20 barrels and 50 bags running landing numbers.
 — (London to Mediterranean)—Each valuation, or 5 casks or 20 bags.
 — (from Java)—Each 25 bags (3 per cent.).
 — (Brazils to United States)—Each 250 bags (5 per cent.).
Coir rope, Coir yarn, and Coir fibre—Every Rs. 1000 value (5 per cent.).
Corn—See *Grain*.
Cotton seed cake—F. P. A. under

10 per cent. on the total interest (American).
Cotton—Every 10 bales running landing numbers and on pickings without reference to series or percentage.
Flax and Hemp—Each interest mark or quality (or each 5 tons or 20 packages).
Fish Oil—Each cask.
Flour—Every 100l. value. (This means *sago* flour).
Gambier—On every \$500 value (5 per cent.). Each 50 packages, or 100l. value.
Ginger—Every Rs. 1000 value running landing numbers (5 per cent.).
Goods (Manchester)—Each package.
Grain—F. P. A., but to pay warehousing, forwarding, and other special charges, as well as partial loss arising from transhipment.
Guano—As in *Grain*, adding "warranted free from all claim for jettison" (and, sometimes, "or the consequences thereof").
Hemp—Each mark or quality, or on each 5 tons as raised from the ship's hold (or, every 10 bales, running landing numbers).
 — (*Russian*)—On each interest, mark, or quality, or on every 5 tons or 20 bales as landed, and on pickings without reference to series or percentage (5 per cent.).
Hides—Each 1000 hides, 10 per

- cent., or warranted F. P. A., unless the vessel be stranded, sunk, or burnt, but to pay the expenses of washing and drying if damaged by sea water, and the same amount to 5 per cent. (or, F. P. A. under 10 per cent. on each 1000 hides).
- Hops*—Subject to 10 per cent. particular average.
- Indigo*—Each package.
- Jute*—Each 50 bales.
- Lac Dye*—Each package.
- Leather*—Each bale, subject to 5 per cent. particular average.
- Linseed*—Every Rs.1000 value running landing numbers.
- Live-stock*—See *Cattle*.
- Meat*—The following clause is sometimes inserted :—F. P. A., &c., but, in case of the prolongation of the voyage after fourteen days, to pay for any damage to, or deterioration of, the meat.
- Mohair*—Each bale.
- Myrabolams*—Each 100 bags (or, every Rs. 1000 value) (5 per cent.).
- Nux Vomica*—Every £100 value (5 per cent.).
- Olive Oil*—Every 5 tuns, and for each mark separately.
- Opium*—Each package.
- Palm Kernels*—Every 8 tuns running landing numbers.
- Palm Oil*—Every 3 tuns or 5 casks running landing numbers.
- Paper*—Each 5 packages (10 per cent.) (or, if in tin, each package).
- Pepper*—Each 50 bags.
- Petroleum* (Antwerp Clause)—Free from claim for leakage unless caused by stranding, collision, or the forced discharge of cargo at an intermediate port of distress, and said leakage amounts to 3 per cent.
- Pimento*—Every 10 bags running landing numbers.
- Rape Oil*—Each 5 tuns.
- Rape Seed*—Each 500 bags running landing numbers (5 per cent.).
- Rice* (from Calcutta)—Each 500 bags (or, each 100 bags).
— (outwards, if cleaned)—Each 50 bags.
- Rum*—Each mark or interest.
- Safflower*—Each 10 bags.
- Sago*—Each 20 boxes.
- Sago Flour*—Every \$500 value (10 per cent.).
- Saltpetre*—Each 100 bags.
- Seed*—See *Grain*.
- Senna*—Each 5 bales.
- Sheep*—See *Cattle*.
- Sheepskins*—Each bale.
- Shellac*—Each package.
- Ship* (*Wooden*)—Warranted F. P. A. below the load water line (a), unless caused by injury to the stem or sternpost (b), fire, grounding, or contact with some substance other than water (c).

(a) Very frequently, of late, "below the marked load line;" a great improvement in the case of British ships, but useless for foreign ships. Other variations are, "below water," and "below the water line." All these variations have, under some circumstances, different effects.

(b) These words are often omitted.

(c) It is very usual to add a clause providing that thirds are not to be deducted, in the case of British-built ships, until eighteen months old: in the case of foreign-built ships, until twelve months old.

Ship (Iron)—Until eighteen months old : in the case of foreign-built ships, until twelve months old.

Liverpool clauses :—

No thirds to be deducted from repairs of ironwork of hull, masts, or spars ; or, in the event of claim, no thirds to be deducted from the cost of repairs.

Glasgow clause :—

On ships up to two years old, calculated from date of registry, no one-third new for old to be deducted from cost of repairs : on ships above two years old no one-third new for old to be deducted from ironwork repairs.

London has no settled custom, so far as I can ascertain.

In addition to the clauses given above, there are the following, which are not unfrequently used :—

No thirds off *ironwork repairs*.

No thirds off repairs of ironwork.

No thirds off repairs to ironwork.

And, no thirds off repairs in ironwork.

Perhaps the latter clause has, as it is intended to have, a more restricted meaning.

The effect of the usual Club

Clauses for iron vessels, whether ships or steamers, is :—On ships up to one year old, no one-third to be deducted except off painting or coating of bottom ; after that age boilers, machinery, sails, spars, rope, woodwork, &c., to be thirded. Repairs to hull to be allowed in full up to three years old ; after that period a deduction of one-sixth, and after six years a deduction of one-third to be made (sometimes the periods are six years and ten years respectively). No painting or coating of bottom to be allowed if it has been on the ship six months.

Silk—Each package.

Soda—Each 10 casks.

Steamer—On ship valued at £

viz. :— £

On hull and materials valued at

On machinery and boilers and everything connected therewith, valued at

£ (a)

To pay average on each valuation separately, without deduction of one-third (b).

Sugar (outwards)—Each valuation (or 5 casks or 20 bags).

— (homewards)—Every 10 hogsheads, 20 barrels, 10 cases, or

(a) The separate valuations are sometimes increased to three, and in the case of heavily valued steamers, to four. The four valuations are :—(1) Hull, &c. ; (2) Masts, spars, boats, sails, ropes, stores, &c. ; (3) Cabins, deckhouses, and furniture ; (4) Machinery, boilers, and everything connected therewith.

A fifth valuation even has been introduced in some very exceptional cases, covering separately the deck machinery, such as steam-winches, donkey-engines, &c.

Sometimes the real object of these subdivisions is attained by a clause providing that average is to be paid if amounting to a certain sum. This certainly has the merit of simplicity.

(b) The club clause is given above, under the head of Iron Ships.

50 bags, running landing numbers.	of cargo at an intermediate port of distress, and said leakage amounts to 3 per cent.
<i>Tea</i> —Average payable on every 10 chests, 20 half chests, or 40 boxes running landing numbers; but no claim to arise for wet or damp in respect of any chest or other package, unless the tea therein contained shall have been in actual contact with sea water.	<i>Wheat</i> —See <i>Grain</i> .
— (Indian)—As above, adding “or river water.”	<i>Wood Goods</i> —On the separate valuations of in and over. Each raft or craft to be deemed a separate insurance.
<i>Timber</i> —See <i>Wood Goods</i> .	<i>Wool</i> (Mediterranean or Black Sea) —Each 5 bales.
<i>Tobacco</i> —Every 10 hogsheads. (Frequently, in the event of claim, to pay the excess only of 5 per cent.).	— (Colonial)—Each bale.
<i>Turpentine</i> (Antwerp Clause)—Free from claim for leakage unless caused by stranding, collision, or the forced discharge	— (River Plate)—Each 5 bales.
	— (East Indian)—Every 10 bales running landing numbers.
	— (South American—West Coast) —Each bale.
	— (Australian)—Each bale.
	<i>Other Produce</i> , not specified above— A sort of general rule is to make up such a number of packages as will give a value of about 100 <i>l.</i> , as the basis of a series.

APPENDIX E.

Perils insured against: Bursting of Boiler.

SINCE these pages were printed, the following case has been decided in the Court of Appeal:—

During fine weather, shortly after sailing, and without external accident of any kind, the boiler of the steamer *Investigator* suddenly burst, gutting the middle of the ship and blowing up her decks, carrying away the bulwarks, and doing much other damage. The cause of the boiler's bursting was that, through some neglect on the part of the engineers or crew, the thickness of the shell of the boiler had in one part of it become so reduced that it was not strong enough to bear the pressure of steam exerted on it in the usual manner. The

steamer was insured by a time-policy in the ordinary form. On these facts, a claim was made on the underwriters for all the damage done, except the replacing of the boiler itself, which was not asked for. Baggallay, L.J., trying the case by consent without a jury, found the facts as above, and pronounced the insurers to be liable, holding that the bursting of a boiler under such circumstances was a peril insured against. This decision was appealed from.

In the Court of Appeal the judgment was affirmed unanimously, but on somewhat different grounds by the several judges. The Lord Chancellor, adopting the sense placed on the words "all other perils, &c.," by Lord Ellenborough in *Cullen v. Butler* (a), viz., that they covered perils "of a like nature" to those specified, added, "What the winds are to a sailing-vessel, steam is to a steamer, and it is as reasonable that marine insurers should bear the risk incident to navigation by that kind of power, whether from excess of pressure on a boiler, or from defects of safety-valves, or from neglect or mismanagement making that dangerous which otherwise would not be so, as that they should bear loss occasioned by excessive pressure of winds, and defects or mismanagement of a ship's sails or tackle." Supposing, his Lordship added, that this defect in the boiler existed at the commencement of the policy, and that it amounted to unseaworthiness, still, in that case, the unseaworthiness was only the *causa sine quâ non*, not the *causa causans* of the accident; and therefore the present case would come under the principle laid down in *Dudgeon v. Pembroke* (see § 205), and the underwriters would be liable. The immediate cause of the accident was the negligence of those on board who ought to have found out the weakened condition of the boiler, and remedied or guarded against it: and this being so, the case of *Dixon v. Sadler* (b) established that this was a peril insured against.

In this judgment, and in the substance of the reasons given for it, the late Lord Chief Justice Cockburn agreed.

(a) 5 M. & S. 461

(b) 5 M. & W. 414.

Brett, L.J., rested his judgment mainly on the ground that explosion was a peril of a like nature with fire. The assured, he said, had rightly abstained from claiming the boiler, since its defective condition would have necessitated its renewal, independently of the explosion. To say, as was said on behalf of the underwriters, that they were only liable for accidents which came to the ship *from without*, was too narrow; though on the other hand he would not say that they were liable for every loss which might happen to a ship on her voyage from fortuitous accident, or from the negligence of the crew. For example, he would not say that if a cask of spirits, part of the cargo, were stove by some careless sailor, the insurers would be liable for the loss of the contents; or that they would be liable for the destruction of perishable articles through mere delay, resulting from the sickness of the crew, which might necessitate the putting into some port. In the present case, the loss claimed being limited to the damage done immediately by the explosion, of which the defect in the boiler and the negligence of the crew were merely the remote causes, he held the underwriters liable for it. The damage to this boiler was not mere wear and tear, because the evidence showed that with proper care either the boiler would not have got into that state, or by lightening the pressure of steam the explosion could have been prevented.

This decision is important, as calling attention to a seat of wear and tear not noticed in this volume, viz., the boiler of a steam-engine. The boiler, as is shown by the evidence in this case, is subject to a continual process of gradual destruction, by the thinning of its plates, partly through the action of the deposit or sediment inside (scaling), and partly through coming into contact with bilge water or damp on the external surface. What may be called the natural life of a boiler, at least of such a boiler as that of the *Investigator*, ranges from seven or eight to possibly ten years, according to the amount of work it has had; but its duration, in a serviceable state, depends very much on the degree of care bestowed on it, in keeping it clean internally, and free from contact with salt water or any damp

on the outside. When it has become thin from age or neglect, the engineers on board usually can and ought to be aware of the fact, and take care to use a correspondingly diminished pressure of steam. In the present case it was taken as a fact that these precautions had been neglected, which neglect was the immediate cause of the explosion.

The decision itself, then, only amounts to this : that, while the damage done to the boiler itself, by the natural process of wear and tear hastened by the neglect of the crew, was not claimed from the insurers, and, in the opinion of Brett, L.J., was rightly not claimed because the boiler must have been replaced in any case, yet all the damage done by the explosion itself to other parts of the ship and machinery was claimable under the policy.

The question now arises whether there is anything in this decision which should modify what has been already said, particularly in § 203 and § 291.

Damage by explosion (§ 203) we must now say is claimable, not merely when the explosion of cargo damages the ship or goods other than those which explode, so that the damage may strictly be said to come from without, but when the explosion of the ship damages the ship. In other words, it is no defence for an underwriter to say that the thing which did the damage and the thing which suffered it were both parts of the same whole or subject-matter insured.

Thus we are brought to a second question, the answer to which may oblige us somewhat to modify or enlarge § 291. If, not explosion, but a violent and sudden displacement, occasioned by wear and tear or defect of some part of the machinery, causes damage to other parts, must not the underwriters, though not liable for the wear and tear or defect itself, be liable for this incidental damage? For example, if a screw-shaft breaks through wear and tear whilst the engine is in motion, and, before the engine can be stopped, the broken piece, moving out of its proper line, breaks or strains other portions of the machinery, is not this a damage, if not by collision, yet by a peril "of a like nature"? The effect of

explosion is to convert the broken pieces of a boiler into missiles, which injure the adjacent parts of the ship by impact ; and the only difference between the two cases is the difference between a thrust and a blow. The question as to the fan or propeller itself, lost by dropping into the sea, is perhaps more difficult ; but on the whole this decision seems to lead to the conclusion that all the damage done to the ship by the breakage, except the broken shaft itself, should be recoverable as a loss by "all other perils."

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